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Supreme Court of the United States

OCTOBER TERM, 1948

No. 542

ANNA M. FOUNTAIN, PETITONER,

vs.

PAUL FILSON AND ANNA F. FILSON

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED FEBRUARY 3, 1949.

APPENDIX

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IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9664.

PAUL FILSON and ANNA F. FILSON, his wife,
Appellants,

v.

ANNA M. FOUNTAIN, Individually, and ANNA M. FOUNTAIN, Administratrix, Estate of BRAINARD FOUNTAIN, deceased, *Appellees.*

Appeal from the District Court of the United States for the District of Columbia.

JOINT APPENDIX

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59 Filed Apr 25 1946

United States District Court of the District of Columbia.

Civil Action No. 30596

PAUL FILSON and ANNA F. FILSON, His Wife, 92 Knickerbocker Road, Englewood, New Jersey, *Plaintiffs*,

v.

BRAINARD FOUNTAIN and ANNA M. FOUNTAIN, His Wife, 4510 Ellicott Street, N. W., Washington, D. C., *Defendants*.

Amended and Supplemental Complaint to Establish a Resulting Trust in Real Estate

For amended and supplemental complaint, plaintiffs Paul Filson and Anna F. Filson, his wife, complain of the defendants Brainard Fountain and Anna M. Fountain, his wife, to establish a resulting trust in real property now in the name of the defendants, for cause:

1. The amount in controversy exceeds $3,000.

2. Plaintiffs reside in Englewood, New Jersey, and defendants in the District of Columbia, plaintiff Filson and defendant Fountain being brothers with different surnames because plaintiff Filson carries the surname of his related and adopted parents.

3. Defendants Fountain claim to be the owners free of claim of plaintiffs of a parcel of land (hereinafter referred to as the property) and its improvements in Englewood, New Jersey, wherein plaintiffs Filson claim a resulting trust, said property being more particularly described as follows:

60 All those certain lots, tracts or parcels of land and premises, situate, lying and being in the City of Englewood, in the County of Bergen, and State of New Jersey, shown and designated as lots numbered Six (6) and Seven (7) on a map entitled "Map of Property of Gorham and Jackson, Englewood, N. J." made by H. Birwhistle, C. E., and filed in the Bergen County Clerk's office as Map #551.

4. Plaintiffs Filson heretofore purchased and thereafter on December 24, 1937, conveyed said property to defendants Fountain for stated valuable considerations embracing the purchase price of $15,000, to wit: in the deed of conveyance the defendants assumed and agreed to pay the $9,000 of mortgages placed against said property by plaintiffs, and by further separate agreement the defendants granted to plaintiffs the option to repurchase the property for $9,000 within three years thereafter, by satisfaction and release of the liability of the defendant assumption, for $9,000 unless defendants paid $6,000 to plaintiff in discharge of the option, whereby defendants secured during three years to plaintiffs either the reconveyance of said property as inclusive of the $6,000 of unpaid purchase price free of claim of defendants, or, at the option of plaintiffs, the proceeds of any interval sale of defendants in excess of the amount thereof required to effect reconveyance to and completion of the sale by plaintiffs, and, whereby, after three years, in case of no reconveyance or no payment of $6,000 to plaintiffs, the title to the property would be and is in defendants subject to the unsecured and unsatisfied purchase price of $6,000 owing to the plaintiffs; no reconveyance or payment in discharge of the option was made in said three years, and defendants never denied the existence of the claim of plaintiffs or liability to plaintiffs in the sum of $6,000
61 until in September, 1945, when defendants refused payment thereof from the proceeds of their projected sale of the property, and instead proposed investment of the proceeds in other real property in response to the demand of plaintiffs for payment of $6,000 from the sale proceeds; thereupon, when plaintiffs sued herein to impress said demand upon the sale proceeds, defendants abandoned said sale.

True copies of the aforesaid deed and option, marked respectively Exhibits A and B and filed with the previous answer of defendants herein, are hereby adopted and made part hereof by reference.

5. The considerations of the aforesaid deed and option were preceded by prior considerations moving between the parties to wit, by written agreement dated March 8, 1937, of which true copy is annexed and made part hereof as Exhibit C, defendant Fountain, in consideration of the agreement of plaintiff Filson to purchase said property for $7,000 and to advance the sum of $3,000 cash to said defendant for its improvement, agreed to take title to said property from said plaintiff on or before June 1, 1937 and to secure payment thereof and of interest, taxes and assessments to plaintiff by execution and delivery of a mortgage on or before August 1, 1937, on said property, in not to exceed the principal sum of $10,000, bearing interest at 4% per annum payable semi-annually and to run for eleven years with the privileges of four years additional extension and of payment at any time; in performance thereof this plaintiff Filson purchased said property for $7,000 and paid defendant
62 Fountain $3,000 for improvement thereof, and the defendant Fountain moved into the property, and, in and after August 1937, paid the monthly mortgage installments, and returned the $3,000 to plaintiff Filson to proceed with the improvements; thereupon plaintiff Filson spent said sum of $3,000 and an additional sum of $5,000, or a total of $8,000, in improvements of the property under contracts and bills exhibited to and approved by defendant Fountain, and thereby, with approval and consent and for the benefit of defendant Fountain, and for purpose of improving the property for conveyance to defendant, invested in said property the sum of $15,000, in purchase and improvements thereof, being $9,000 derived from mortgage proceeds and $6,000 provided as cash; plaintiffs Filson thereupon conveyed and defendants Fountain took title to said property as aforesaid.

6. Since August, 1937, and continuously thereafter, defendants Fountain have occupied or profitably rented said property as improved, and, in September, 1945, contracted to sell same for $15,600, and thereupon denied they should

pay to plaintiffs Filson the sum of $6,000 payable as aforesaid, and instead claimed and now claim to possess and own said property free of said claim for $6,000.

7. The premises considered, plaintiffs Filson allege the parties intended the conveyance of the property to defendants Fountain was for a principal consideration of $15,000, to be evidenced by defendant assumption of $9,000 of mortgages and further payment of $6,000 by defendants to plaintiffs; that plaintiffs have fully performed and defendants have only partially performed by assumption of said mortgage debt and by failure to pay said $6,000; that plaintiffs are without adequate remedy against defendants to enforce payment of said $6,000 except or unless by judicial action and determination that defendants Fountain under said deed and option agreement have and hold property of plaintiff of the value of not less than $6,000 in resulting trust for the use and benefit of plaintiffs, and, upon failure of defendants to pay or secure said amount to the satisfaction of plaintiffs, that plaintiffs recover judgment for $6,000 and legal interest secured by lien and said property be subjected by sale for the satisfaction thereof.

WHEREFORE, plaintiffs Filson pray:

That it be adjudged and decreed herein that plaintiffs have an undivided beneficial interest in said property of the value of not less than $6,000; that defendants hold said property in resulting trust for the benefit of plaintiffs to the extent of said beneficial interest, that plaintiffs recover $6,000 and legal interest from defendants and a lien to secure same upon said property, and that said property be ordered sold to satisfy unless defendants pay same to plaintiffs, that plaintiffs recover their costs and be granted all other relief to which they appear entitled.

CAMDEN R. McATEE.
Attorney for Plaintiffs.

[Exhibit A to this Amended and Supplemental Complaint is printed hereafter under the heading "Defendants' Exhibit No. 8"; Exhibit B is printed under the heading "Defendants' Exhibit No. 9"; and Exhibit C is printed under the heading "Defendants' Exhibit No. 3."]

66 Filed Jun 6 1946

Answer to Amended and Supplemental Complaint

Defendants for answer to the amended and supplemental complaint say:

First Defense

Plaintiffs' amended and supplemental complaint fails to state a claim upon which relief can be granted.

Second Defense

The Court lacks jurisdiction over the subject matter.

Third Defense

In answer to the numbered paragraphs of said amended and supplemental complaint defendants admit, deny and allege as follows:

67 Paragraph 1. Admitted

Paragraph 2. Defendants admit that plaintiffs reside in Englewood and the defendants in the District of Columbia and admit that plaintiff Paul Filson and defendant Brainard Fountain are brothers. They allege that when he was about 37 years old plaintiff Paul Filson, whose natural parents were living at the time, was adopted by Mrs. Filson, a widow of advanced years, since deceased, who, prior to said adoption, was in no way related to said Paul Filson. Except as herein admitted and qualified, Paragraph 2 is denied.

Paragraph 3. Defendants admit that they claim to be and allege that they are owners of the property described as follows (hereinafter called the property):

All those certain lots, tracts or parcels of land and premises, situate, lying and being in the City of Englewood, in the County of Bergen, and State of New Jersey, shown and designated as lots numbered Six (6) and Seven (7) on a map entitled "Map of Property of Gorham and Jackson, Englewood, N. J." made by H. Birwhistle, C. E. and filed in the Bergen County Clerk's office as Map # 551.

Defendants deny that plaintiffs have any claim upon or interest in said property or claim against the defendants of any kind, whether in the nature of a resulting trust or otherwise.

Paragraph 4. Defendants admit that the plaintiff Paul Filson purchased the property and that on December 24, 1937 plaintiffs conveyed it to the defendants for a valuable consideration. They deny that the consideration for the conveyance from plaintiffs to the defendants embraced a purchase price of $15,000.00. Defendants admit that
68 Exhibit A attached to their answer to plaintiffs' original complaint is a true copy of the deed of conveyance from plaintiffs to defendants. Defendants admit that Exhibit B to their answer to plaintiffs' original complaint is a true copy of an option agreement between plaintiffs and defendants. To the extent that the allegations of Paragraph 4 as to these Exhibits are inconsistent with or add to the Exhibits themselves, such allegations are denied. Plaintiffs' allegation that the failure of the plaintiffs to exercise their option, or the failure of the defendants to pay the price fixed for obtaining release of the option prior to its expiration, would leave title in the defendants "subject to the unsecured and unsatisfied purchase price of $6,000.00 owing to the plaintiffs" is denied. Defendants admit that plaintiffs did not exercise said option and that defendants did not pay to have it released prior to its expiration date. Defendants allege that from the date of the expiration of said option until September 1945, plaintiffs never claimed to have any right to interest in or claim upon said property of any kind whatsoever. They allege that, after the expiration of said option, plaintiffs first claimed

an interest in said property or the proceeds thereof in September 1945. Defendants admit that they did not deny the existence of plaintiffs' claim until plaintiffs first advanced it in September 1945. They admit that they then denied that plaintiffs had any claim upon or interest in said property or the proceeds of its sale and that they refused to agree to pay any part of the proceeds of the pro-
69 jected sale of the property to plaintiffs. Defendants admit that they intended, at the time, to use the proceeds of the sale of said property to buy themselves another house. Defendants admit that they entered into a contract for the sale of the property which was not carried out. They allege that the purchaser refused to fulfill her contract and deny that the sale of the property was not completed because of the institution of this suit.

Paragraph 5. Defendants deny that the deed and option (Exhibits A and B to defendants' answer to the original complaint herein) grew out of or were in any way connected with the written agreement dated March 8, 1937, which is Exhibit C to plaintiffs' amended and supplemental complaint. They admit the execution of said agreement. They admit that plaintiff Paul Filson purchased said property for $7,000.00. They allege that the plaintiff Paul Filson contracted to buy said property before said agreement of March 8, 1937 was entered into. They admit that plaintiff Paul Filson advanced defendant Brainard Fountain $3,000.00 according to the terms of said agreement. They allege that the agreement of March 8, 1937 was abandoned by mutual agreement and that defendant Brainard Fountain repaid said $3,000.00 to plaintiff Paul Filson, less approximately $165.00 paid by defendants to a heating contractor for expense incurred in connection with a heating contract for the house which was cancelled when the agreement of March 8, 1937 was terminated. Defendants allege that plaintiff Paul Filson completed his purchase of said property after the contract of March 8, 1937 had been
70 terminated by taking title in his own name. Defendants admit that plaintiff Paul Filson made improve-

ments to said property. They deny that these improvements were made for defendants benefit or for the purpose of conveying the property to defendants. They deny that the contracts and bills for the improvements were approved by defendants at any time. Defendants admit that after the improvements on the property had been completed, the bills for them were exhibited to defendant Brainard Fountain. Defendants allege that the improvements were made by plaintiff in his uncontrolled discretion on his own behalf. Defendants admit that plaintiff Paul Filson spent a substantial sum for improvements to the property, but for lack of information sufficient to form a belief, deny that the amount expended for improvements was $8,000.00. They admit that they moved into the property as a lessee of its owner, the plaintiff Paul Filson, and that from August 1, 1937 to December 24, 1937, they paid rent to the plaintiff Paul Filson, the rental for the months of September, October, November and December being paid to the Englewood Mutual Building and Loan Association of Englewood, New Jersey, for the account of the plaintiffs, to apply on the monthly payments due under a mortgage placed on the property by plaintiffs.

Paragraph 6. Defendants admit that they occupied said property as lessees of plaintiff from July 1937 to December 24, 1937, and as owners from December 24, 1937 to May 1942, and that since May 1942 they have, as owners, leased the property from time to time to others. Defen-
71 dants admit that in September 1945 they contracted to sell said property for $15,600.00. Defendants admit that they have refused to pay the plaintiff $6,000.00 or any other sum and that they deny that plaintiffs have any interest in or claim upon said property or against the defendants.

Paragraph 7. Defendants deny that the conveyance of the property to defendants was for a principal consideration of $15,000.00 and that they hold any property of the plaintiffs in resulting trust for the use and benefit of plain-

tiffs. The remainder of the allegations of Paragraph 7 are denied.

All allegations of plaintiffs' amended and supplemental complaint not hereinbefore expressly admitted, qualified or denied, are denied.

Wherefore, defendants pray:

That plaintiffs' amended and supplemental complaint be dismissed at plaintiffs' costs.

WILLIAM M. AIKEN
Attorney for Defendants

72 Filed Feb 17 1947

Suggestion of Death—Motion for Substitution of Party

Plaintiffs, Paul Filson and Anna F. Filson, by their attorney, suggest the death in August, 1946, of the defendant, Brainard Fountain, otherwise known as Brainard V. Fountain, and for cause that the claim sued on is not thereby extinguished and that Anna M. Fountain, the other defendant herein is the duly qualified personal representative of the deceased as shown by copy of testamentary letters attached,

Moves the Court for an order substituting

Anna M. Fountain, Administratrix of the Estate of Brainard V. Fountain, deceased, as party defendant herein in place of said Brainard Fountain and providing for the action to proceed without prejudice to the proceedings already had in same.

CAMDEN R. MCATEE
Attorney for Plaintiffs.

[Annexed Testamentary Letters Omitted.]

75 Filed Mar 18 1947

Order Dismissing Motion for Substitution of Party Defendant

This cause having been duly assigned for hearing on Suggestion of death—motion for substitution of party defendant, filed herein February 17, 1947, the same having been called on the 17th day of March, 1947, and no response thereto by either party, it is this 18th day of March, 1947,

Ordered that said suggestion of death—motion for substitution of party defendant be, and the same is hereby dismissed for want of prosecution.

By the Court,

T. ALAN GOLDSBOROUGH
Justice.

76 Filed Apr 22 1947

Motion for Summary Judgment for the Defendant Anna M. Fountain

The defendant Anna M. Fountain moves the Court for a summary judgment in her favor under Rule 56 of the Federal Rules of Civil Procedure, and for reasons therefor refers the Court to paragraph 3 of plaintiffs' Amended and Supplemental Complaint and to that portion of paragraph 4 thereof which incorporates by reference the deed and option (marked Exhibits A and B respectively) attached to defendants' answer to plaintiff's original complaint, which answer was filed herein October 12, 1945.

WM. M. AIKEN
Attorney for defendant, Anna M. Fountain

77 Filed Apr 29 1947

Motion to Vacate Order and Grant Prior Motion for Substitution.

Plaintiffs by their attorney move the Court:

To set aside and vacate the order herein denying their previous motion for substitution of party, and

To grant said motion

For cause:

Upon hearing of the prior motion and defendant representations that the title to the property so descended as to require the infant heirs as well as the representative of deceased defendant to be made parties defendant, their attorneys asked for time to investigate and settle upon the procedure, and did not understand the motion was continued to a certain day, or that on said day it was denied for lack of prosecution.

Plaintiffs now submit that the defendant Anna M. Fountain, widow, was a tenant by entirety with her late husband, and, upon his death, has succeeded to and holds title to said property to exclusion of their children, and that said title is subject to the claim alleged as existing against same during the tenancy by entirety until said claim is determined.

CAMDEN R. MCATEE
Attorney for Plaintiffs.

. . . . . .

Excerpt from Proceedings

44 Mr. Aiken: May it please the Court, if I may first address myself to the question of substitution. Mr. McAtee originally made a motion to substitute the administratrix, which I opposed on the ground that the children were the proper parties to substitute rather than the administratrix, in view of the fact that Mr. Fountain
45 died intestate, and that I thought that under the law of New Jersey the property then went to the chil-

dren. We argued that matter before Judge Goldsborough, who agreed with me and gave Mr. McAtee time in which to amend his motion to ask for substitution of the children rather than the administratrix.

Due to an understanding between both of us, he did not do that within the time he was expected to, and his motion was dismissed for that reason.

I wish to take no advantage of that point, because that was due to an understanding between us. He has now renewed his motion to substitute the administratrix, and in the meantime it has appeared that in New Jersey where a deed is made to a man and wife without words of explanation, they take by the entireties, which was a doctrine foreign to me, and at the time I made the argument to Judge Goldsborough it was not advanced on behalf of the plaintiff, and I just did not know about it. Later Mr. McAtee called my attention to that situation, and that is so.

* * * * * * * * * * *

131 Filed May 15 1947

Judgment for the Defendant

This matter came on for hearing on May 13, 1947, on the Defendant's motion for summary judgment and on the Plaintiffs' motion to vacate the order denying their motion for substitution of the Administratrix of the Estate of Brainard Fountain, Deceased, and to grant said motion.

Upon consideration of Plaintiffs' motion to vacate the order denying their motion for substitution of the Administratrix of the Estate of Brainard Fountain, Deceased, and to grant said motion, the Court finds that the Administratrix of the Estate of Brainard Fountain, Deceased, has no interest in this action, and that the Defendant, Anna M. Fountain, now owns the whole of the title to said property;

It Is Therefore Adjudged And Ordered that Plaintiffs' motion to vacate the order denying their motion for substitution of the Administratrix of the Estate of Brainard

Fountain, Deceased, and to grant said motion, be and it is hereby denied.

132 The motion of the Defendant Anna M. Fountain for summary judgment under Rule 56 of the Federal Rules of Civil Procedure having been heard upon the pleadings and depositions now on file, together with the exhibits to said depositions, and after argument thereon by counsel, it is by the Court this 15th day of May 1947

Adjudged and Ordered that the motion of the Defendant Anna M. Fountain for summary judgment be, and the same is hereby granted and judgment is hereby entered for the Defendant with costs to be paid by the Plaintiffs.

DAVID A. PINE
Justice

. . . . . .

Deposition

81 **Brainerd Fountain**, a witness of lawful age, was thereupon duly sworn and, being examined by counsel, testified as follows:

Direct Examination

By Mr. McAtee:

Q. What is your name? A. Brainerd Fountain.

Q. You are one of the defendants in this action? A. That is right.

Q. What is your relation to the plaintiff Mr. Filson? A. My brother.

Q. How do you account for the difference in names? A. Some years ago he became adopted.

Q. In December 1937 did your brother convey a house to you in Englewood, New Jersey? A. He did.

Q. Was that conveyance made by the deed, a copy of which is attached to your answer? A. I believe so. It was conveyed by a deed. I presume that is the deed you have there.

Mr. McAtee: We agree on that, don't we?

Mr. Aiken. Yes.

By Mr. McAfee:

Q. Do you have any other property in Englewood besides that? A. No.

82 Q. When did you first move into that property? A. I believe it was either late July—I believe it was late July of 1937.

Q. At that time what was the condition of the property? A. It was in the process of being remodeled.

Q. When were those improvements begun? A. Sometime in the spring of the year, after title was taken to the property.

Q. Was that property improved when Mr. Filson bought it? A. No, it had not been improved.

Q. When were those improvements finished? A. I imagine the early fall, maybe September or October, 1937.

Q. Can you tell me how much Mr. Filson paid for the property when it was unimproved? A. I believe he said it was around $7,000.

Q. Can you tell me how much he spent on the improvement of that property? A. I believe he said he spent a total of between $15,000 and $16,000.

Q. Did you subsequently make any inquiry of him, or get his bills, as to the amount of those improvements? A. After the property was transferred to me he showed me the bills which had been accumulated in connection with the remodeling of the house.

Q. Do you know the amount of them? A. I don't have them. I didn't have any occasion to keep them.

83 Q. Then what would you say the property stood him at the time you moved into it in expense and cost? A. You are asking me to remember figures and I am not sure of them. I will say the same figure as before, between $15,000 and $16,000. I don't know.

Q. When you took title to that property what were the considerations for your taking title?

Mr. Aiken. I object to that as being too broad and calling for the conclusion of the witness.

By Mr. McAtee:

Q. I mean, what did you pay for the property, assumption or any money? A. I assumed two mortgages.

Q. Do you know the amount of those mortgages? A. One mortgage was for $6,000 with the building and loan and one for $3,000 to Mrs. Fountain, my mother.

Q. Did you pay anything in addition to that? A. There was no cash at the time of the transfer of the property.

Q. After you took title to that property were there any further improvements made on it? A. Some I made myself.

Q. Were any made by him—by Mr. Filson? A. None that I recall. He might have come over and improved two or three things, he might have helped me with them. It was more or less personal.

Q. Have you ever paid Mr. Filson the difference of $6,000 that he put into that property? A. I have not.

84 Q. Before you moved into this property and before you took title to it, did you and Mr. Filson have any agreement in reference to what was to be done about the property? A. There was an agreement signed earlier that year, after the property had been purchasd, but that agreement was never carried out.

Q. Is this a duplicate copy of the agreement which was signed at that time (handing paper to witness)? A. I believe so.

Q. Say yes or no: A. Yes; it appears to be.

Q. Well, look at it. Are those your signatures? A. It appears to be.

Q. It is a duplicate copy of the original? A. That is right.

Mr. McAtee. Would you identify that as Fountain Exhibit No. 1?

(Agreement was marked Fountain Exhibit No. 1 for identification.)

By Mr. McAtee:

Q. By this agreement of March 1937 what did Mr. Filson agree to do?

Mr. Aiken. Oh, I object to that. The agreement speaks for itself.

By Mr. McAtee:

Q. By this agreement Mr. Filson agreed to furnish $3,000 to you to make improvements. Did he furnish you that money? A. He did.

Q. Did you use that money in the improvements? A. I returned most of it to him.

85 Q. You returned it to him? A. Yes.

Q. Did he then spend the $3,000 on the property? A. He probably spent more than that.

Q. By this agreement you were to take over this property for $10,000, weren't you? A. That is right.

Q. You did take over the property for $10,000, didn't you? A. I did not.

Q. What? A. I did not. That agreement expired because at the time of the agreement we said we wanted no part of that agreement. At the time that agreement was filed—certain things were in there, certain stipulations are in there, and as time progressed, since the agreement was not being carried out, we said no, we wanted no more part of it, and the agreement was abolished, so far as we were concerned.

Q. Well, you were to take over this property for $10,000 under this agreement? A. That property was to be—under that agreement—was to be conveyed to me at the time of the transfer of the title, which was originally when the property was purchased, in March of that year. Furthermore, I was to spend $3,000 in my own way. That was not carried out and because of that I told him I didn't want it, and I returned his money to him. I told him we didn't want to take the property at all.

Q. You didn't want to take the property? A. That is right.

86 Q. You say you told him that? A. Yes.

Q. Yet you moved into it within thirty days? A. No! We were in the property when the money was returned to him.

Q. You had already taken possession? A. No. We were living in the house on a rental basis. We went in there on a rental basis. As far as this agreement, it was terminated.

Q. Under this agreement if you had carried this agreement out, you would have given him a mortgage for $10,000 on this property? A. And I would have had my choice in the way the work was to be done.

Q. When you did take over the property you assumed mortgages of $9,000? A. It had no relation to this agreement whatsoever. It was a different transaction entirely.

Q. It was the same house, wasn't it? A. It was under different terms.

Q. Well, the $3,000 that he was to put up under this agreement, he put into the property, didn't he? A. Well, he spent it the way he saw fit, not the way I saw fit. This contract said I would have a choice and be able to make expenditures and do it in my own way. The whole thing was taken out of my hands and the money was returned. The property was never transferred to me until many months later, under different conditions, aside from that agreement.

87 Q. These improvements that were made on the property were made with your approval, weren't they? A. No. He contracted for them himself.

Q. He let the contracts? A. They were his contracts. I was not consulted in the contracts in any way. He made his own negotiations.

Q. You didn't disapprove of them? A. It was not my property. How could I disapprove?

Q. You were living in it? A. Yes, on a rental basis. I had nothing to say as to the amount of money he put in the property.

Q. When you moved in in July, did you pay him anything? A. I paid him in August, on a rental basis. He told me I could live there one month without any rent. He said, "It is a good investment for you to live there on a rental basis," and I said, "All right. I don't want it, but if that is what you want, all right." Thereafter I had nothing to say about his contracts.

Q. How much rent did you pay him? A. The first month, $75. Subsequently, $60, plus the assuming of the taxes, which ran about $40 a month, $475 a year, and plus other expenses.

Q. What other expenses would you have? A. Well, for example, your insurance, and things of that kind.

Q. That was not on the property, was it? A. On the property?

Q. Yes. A. That came in the following year on the 88 rental. I will take that off.

Q. I am trying to get now what you did before you took title. I am not trying to be unpleasant about this. A. I know you are not.

Mr. Aiken. I think you are talking a little too fast. Think about the question a little bit.

By Mr. McAtee:

Q. Between the time you moved in the property, which was in July—is that right? A. That is right. Late July.

Q. —and December 24th—let's be definite—what rent and expenses did you pay? A. I paid $75 for the month of August and $60 thereafter to the building and loan monthly.

Q. To the building and loan? A. That is right.

Q. What was that on? A. For the mortgage which was on the property.

Q. Well, the mortgage was not put on the property until December 24, was it? A. There is an earlier mortgage that

was put on the property. It was requested in May and concluded early in August. $6,000.

Q. Oh, there was a previous mortgage? A. That is the building and loan mortgage I am speaking about now.

Q. Your conclusion or your statement is that this agreement of March 1937 was never given any effect? A. So far as I was concerned, it was of no effect because
89 the provisions were not carried out.

Q. When you took title in December, the $6,000 he had spent on improvements, of which you had the advantage, were not paid for by you, were they? A. Will you state that question again?

Q. You didn't pay the $6,000 above the $10,000 assumption, that he had spent on the property, did you? A. All I did on the property was to assume the two mortgages.

Q. I say, there was $6,000 more than that spent on the property, wasn't there, between five and six thousand dollars? A. If Mr. Filson so stated, that is right.

Q. And you haven't paid him any part of that? A. I have not.

Q. Did you subsequently offer this property for sale, Mr. Fountain? A. Yes, this summer.

Q. Under what circumstances? A. What do you mean by circumstances? I just offered it for sale. We had a buyer.

Q. When was that? A. This summer—August of this year.

Q. Did you notify Mr. Filson you were offering it for sale? A. No.

Q. Did you make a contract to sell it? A. I did.

Q. What were you to get for it? A. $15,600.

90 Q. Did that contract go through? A. It did not.

Q. Why not? A. The woman couldn't go through with it.

Q. Couldn't raise the money? A. Apparently so.

Q. Did she make a deposit on the contract? A. She did.

Q. What became of the refund? A. I had to refund it.

Q. Who paid the broker? A. We got a release from the broker. It wasn't necessary.

Q. There is no contract for sale of the property at all? A. Not at the present time.

Q. And this contract fell down after this action was instituted, didn't it? A. During that period. That is right.

Q. Did Mr. Filson call you up or ask you about your projected sale of this property? A. He did.

Q. Where were you at that time, in Englewood? A. No. I was in Washington.

Q. What did you say to him? A. Well, he did most of the talking.

Q. Well, you said something in reply, didn't you? A. No. The substance of it, he asked me what I was going to do about the property, asked me if what he heard was correct, that I was going to sell it, and I said it was true.

91 He asked me about what his equity was in it and I told him I felt he didn't have any equity in the property.

Q. Did he make any reply to that? A. He did. He said, "Well, I want to know what you are going to do about my money in there."

I said, "I will let you know."

This concluded the conversation.

Q. Then what did you do? A. Subsequently I visited Englewood and I called upon him.

Q. You went to see him in Englewood? A. I was up there on another matter. While I was in Englewood I went over to his house.

Q. What did you say to him then? A. I indicated to him that the property was for sale. He asked whether we intended to give him anything for his equity. We replied actually all we were doing was transferring the proceeds from the sale of the house in Englewood to the purchase of a house in Washington.

Q. You and he talked about the equity he had in the house, did you? A. Undoubtedly that arose. I cannot recall the exact substance of it.

Q. Well, do you deny he had an equity in the house? A. I told him I felt that the house was sold, that he had had an opportunity to repurchase it under his option agreement and that had not been exercised, and I felt the house had been sold and we had the full equity in it.

Q. Well, now you have referred to an option agree-
92 ment. We haven't heard anything about that. What is the option agreement? A. I believe a copy has been submitted.

Q. Is that the agreement which you likewise attached to your answer?

Mr. Aiken. That is conceded.

By Mr. McAtee:

Q. Is this the option agreement (handing paper to the witness)? A. That is it; yes.

Q. It is? A. Yes. It is a different form than this one. Is that the original one?

Q. No. That is a transcript from the Court. A. Well, that is what it is, then.

Q. This option is dated December 24, 1937. A. That is right.

Q. That was made the same day as the deed to you, was it? A. That is correct.

Q. Both of those papers were drawn up before the deed was delivered to you; is that right? A. That is right.

Q. Who drew up those papers? A. My brother's attorney.

Q. Was he your brother's attorney or your attorney? A. It was not my attorney. I thought it was my brother's attorney.

93 Q. Where is this Mr. Morrison? A. He is in Hackensack, I believe.

Q. Was Mr. Filson present with you when these agreements were drawn up by Mr. Morrison? A. That is right.

Q. What was the arrangement under which they were drawn up? What agreement had you and he reached about the matter?

Mr. Aiken. I object to that on the ground that the instruments speak for themselves.

Mr. McAtee. That is all right. He can still state the circumstances under which they were drawn up.

By Mr. McAtee:

Q. What led up to these agreements? What was the conversation about it? A. The preliminary arrangement there—my brother wanted to borrow some additional funds, and in order to do so the funds were made available by my mother, who would not loan the money on the property unless I signed the notes—

Q. Unless you signed what note? A. It was the bond on the deed—to my mother.

Q. Do you have a copy of that mortgage to your mother?

Mr. Aiken. Here it is (handing paper to counsel). This is off the record.

(There was a discussion off the record.)

By Mr. McAtee:

Q. Let's go back a minute, Mr. Fountain, and see if we cannot get this straight in this way: When it came time to make title to you for this property, do you know whether this property was encumbered by any previous mortgage?

A. Yes, the building and loan, the one I was making
94 the payments on.

Q. The one you were paying on? A. Yes.

Q. Did you or did you not agree with Mr. Filson that that should be taken off and a new mortgage to the building and loan should be made? A. No; there was no discussion of that kind that I recall, Mr. McAtee.

Q. Well, you made a new mortgage on December 24 to the building and loan, didn't you, or some one of you? A. No; I didn't make a new mortgage to the building and loan.

Q. Well, did Mr. Filson make one to the building and loan on December 24? A. Not that I know of.

Q. The deed to you of December 24, 1937, recites that the premises are subject to lien of two mortgages; one made

by Paul Filson and Anna Filson, his wife, to the Englewood Mutual Building and Loan Association, in the suit of $6,000, and the other mortgage of $3,000 by Paul Filson and Anna Filson, to Laura S. Fountain, dated December 24, 1937. There was no new building and loan mortgage made at that time? A. Not at that time; no.

Q. There was a new mortgage made to your mother, a second mortgage, for $3,000? A. That is right. December 24.

Q. How much was owing on the first mortgage to the building and loan association at the time you assumed it?

A. Well, when I took over it was a full six thousand
95 dollars. By December, at the time you are referring to, I don't think the amount had been reduced very greatly on a 6 percent mortgage over that period of time. So it was probably still in the neighborhood of $6,000.

Q. Well, I had the impression from this deed dated December 24, 1937, that that applied to both of those mortgages. As a matter of fact— A. There was only one building and loan mortgage at that time. That was the $6,000 one. That was placed in August 1937.

Q. That was previously on the property? A. That was on the property—that was placed there while I was in the house. That was used to pay off some of the construction contracts.

Q. In other words, by that $3,000— A. No. $6,000.

Q. What about the original consideration for the property—the $6,000? A. I think you and I are getting a little confused here.

Mr. Aiken. Why don't you sit back and let him ask the questions and you give the answers?

The Witness. All right. Go ahead.

By Mr. McAtee:

Q. Well, Mr. Filson bought this property for $7,000; is that correct? A. That is correct.

Q. Did he pay cash for it? A. I believe he did.

Q. Then when he got a $6,000 mortgage on it he got $6,000 of that back, didn't he? A. No. The $6,000 which he
96 obtained from the building and loan was used for paying the expenses for part of the remodeling of the house.

Q. Now then, what was the $3,000 that he got from his mother used for? A. That was used for his own personal matters. It had nothing to do with the property.

Q. Then he got part of the $7,000 back in that, didn't he? A. He obtained a $3,000 mortgage from my mother.

Q. Well, now, when you folks got together and went to make this deed to you, how did this question of this option come up in this $6,000? A. My brother wanted the privilege of buying the property back, because he fully expected to receive additional funds and be able to take it back again. This option was something I didn't prepare. It was prepared and I signed it. It was not my wording, nor are any of the clauses there clauses that I requested or suggested.

Q. He didn't take the property back under that option, did he? A. He did not.

Q. And you didn't pay him the $6,000 to release that option, did you? A. I assumed that the option expired as of the date—

Mr. Aiken. Just pay attention to what he asks you and then answer.

By Mr. McAtee:

Q. I asked you if you paid him $6,000. A. No.
97 Q. After that option expired did you and he discuss this $6,000? A. We did not.

Q. Not at all? A. Nothing on the basis that I would refresh my memory that he was going to take the property back.

Q. Did you ever talk to him about taking the property back after this option expired? A. Not after the option expired; no real discussion. We made several suggestions

before we financed it that we hoped he would—that was when my mother still had the equity in the property.

Q. After he learned of this sale of the property, did you discuss this equity about $6,000? A. That is the same conversation we spoke about before.

Q. You said you wanted to put that money into property down here? A. I said I wanted to put the money I derived from the sale, any equity I had in that property, into the property down here at Washington.

Q. And he objected to it, didn't he? A. He objected to it.

Q. Have you invested that money in any way down here as yet? A. The house has not been sold.

Q. The house has not been sold. That is a complete answer to that. Now, you referred a minute ago to a bond or an arrangement in connection with the $3,000 mortgage to your mother. What was the purpose of that bond? A. My mother wanted security from myself on the mortgage; otherwise she would not loan the money.

Q. Is this the original bond you speak of (handing paper to the witness)? A. Yes.

Mr. McAtee. Will you identify that as Fountain Exhibit No. 2?

(Mortgage was marked Fountain Exhibit No. 2 for identification.)

By Mr. McAtee:

Q. Did you pay off this mortgage to your mother, of $3,000? A. It has been liquidated with my mother.

Q. Did you pay the interest on it? A. He paid the interest during the three-year period I paid it for the last year and a half, and about a quarter of the first two years.

Q. Did you ever ask your brother to pay any of the interest on that mortgage? A. He paid part of the interest on the mortgage.

Q. I show you a check dated June 30, 1938, for $45; a check dated December 22, 1938, for $90; and a check dated

July 18, 1939, for $90. The first check is signed by Anna S. Filson and the other two checks by Paul Filson; and they are each of them to the order of Mrs. George Fountain, and they bear notations—two of them do—that they are part interest on the Linden Avenue property.

Are those items which Mr. Filson paid for you?

Mr. Aiken. I object to the introduction of those checks or any questions about them. There is no evidence that Mr. Fountain has ever seen them before or knows anything about those particular checks.

Mr. McAtee. I am letting him find out about them.

The Witness. They would appear to be part of the interest, at least two of them, which are so indicated on the checks, and so signed by the recipient, that they were part interest on the mortgage.

By Mr. McAtee:

Q. Was that paid for your account by Paul Filson? A. That was paid by Paul Filson because he was still listed on the mortgage.

Q. Well, you had assumed the mortgage, hadn't you? A. I had assumed the mortgage, but he agreed to assume the interest on that mortgage.

Q. He agreed to assume the interest on the second mortgage? A. That is right. He did. There was nothing in writing. I agree on that.

Q. Well, by your deed of December 24, there is a provision that says the premises are conveyed subject to the lien of two mortgages, describing the Englewood Mutual Building and Loan Association mortgage of $6,000, and a second mortgage to Laura Fountain of $3,000, which mortgages the party of the second part hereby assumes and agrees to pay. A. I assumed the mortgage, but my brother said he would pay the interest on these mortgages and he started to pay the interest on these mortgages, as evidenced by—

Q. Why was it your brother did all these things for you, Mr. Fountain? A. I don't know whether you consider it much assistance, when you assume an

obligation to live in a house, where you move from a place where you are paying $45 a month into a place costing about $145 or $150 a month. At the time we took this we stated we didn't want to take the property over; we made it very clear to him; as an accommodation to him we assumed this, in order that he could receive additional funds to protect another piece of property which he had in Florida. It was done as an accommodation to him.

Q. Why was the mortgage of $3,000 made in the name of Anna and Paul Filson, when you were the owner of the property? A. He gave my mother the mortgage when he received the cash. That was all subsequently transferred over to me. In other words, it was prepared on the basis of giving her a mortgage first and then deeding the property to me subject to this mortgage.

Q. You were to pay your mother the mortgage and everything that went with the mortgage, interest on the mortgage, and so forth, weren't you, to pay the whole thing? A. I was on the bond. I wasn't on the mortgage to my mother.

Q. Well, you assumed it under the contract? A. I assumed it. That is right.

Q. And you assumed the building and loan mortgage? A. That is correct.

Q. You paid the interest on the building and loan mortgage? A. I paid off the carrying charge on a rental basis.

101 Q. That included interest, didn't it? A. Yes.

Q. Didn't you pay off your mother's mortgage in the same way? A. Subsequently I did.

Q. What would your brother have done with this house if you hadn't taken it over? A. He could have rented if to others, which we asked him to do.

Q. Could he have sold it? A. We asked him to sell it.

Q. Could he have gotten $15,000 for it? A. That is extremely doubtful.

Q. Didn't he buy this house originally for you? A. He bought it for himself as an investment.

Q. Under the contract of March 1937? A. I think that contract of purchase was entered into before the agreement with myself. He bought the house for himself. We said we didn't want it.

Q. You didn't want it? A. Absolutely. From the very beginning.

Q. But you got it and you still have it and you have $6,000 of his money in it, haven't you? Mr. Aiken. Well, if that is a question, I object to it as argumentative.

By Mr. McAtee:

Q. Well, you agree to that, don't you? A. Will you repeat your question?

Q. You got the house and it has $6,000 of his 102 money in it?

Mr. Aiken. Same objection.

The Witness. I have the house.

By Mr. McAtee:

Q. And the $6,000 of improvements that he put in the house? A. I have the house with the improvements.

Q. That is right. And you haven't paid him for—

Mr. Aiken. Same objection.

The Witness. I cannot understand the question. I am trying to answer the questions.

By Mr. McAtee:

Q. Well, have you paid for those improvements?

Mr. Aiken. The answer, I think, is that he paid for the house.

The Witness. I have paid for the house.

Mr. Aiken. The rest of it is all in the record.

By Mr. McAtee:

Q. Did your brother ever give you the equity of $6,000, represented by these improvements? A. Well, he gave me the deed to the property, if that is what you mean.

Q. And you gave him an option back? A. I gave him an option.

Q. You recognized there was $6,000 there that you would have to pay in order to defeat that option?

Mr. Aiken. I object to that on the ground that the instruments speak for themselves.

103 By Mr. McAtee:

Q. You recognized you would have to pay him $6,000 to prevent him from taking the property back, didn't you, by this option? A. He could take the property back from me any time before the option period expired by the paying back of the mortgages.

Q. And you could only prevent him from doing that by paying him $6,000?

Mr. Aiken. I object to that as a construction of the instrument—putting a false construction on a written instrument. I object to that as calling for parol evidence about a written instrument.

By Mr. McAtee:

Q. You would have to pay him $6,000 to keep him from taking the property back under that option; isn't that right?

Mr. Aiken. Same objection. There isn't anything in the—

By Mr. McAtee:

Q. Well, answer the question. A. Do I have to answer that question?

Mr. Aiken. Go ahead and answer it.

By Mr. McAtee:

Q. I will repeat it: You would have to pay him $6,000 in order to prevent him from taking the property back under that option? A. I had no intention of exercising that portion of the contract. I didn't feel the house had that much equity in it.

Mr. McAtee. That doesn't answer my question.

Mr. Aiken. Just tell him what your agreement
104 was. Look at it. Read it.

The Witness. I agree that—oh, I think it is almost self-evident from what it says in here, isn't it, Mr. McAtee?

By Mr. McAtee:

Q. Sir? You agree to what? A. I agree in here if I wanted to retain the property and not permit the option feature—if I wanted to defeat the option I could pay him this amount.

Q. That is right. That is all I wanted to know.

Now, did you say Mr. Filson intended to give you this property to the value of $6,000? A. I don't think he ever intended to give it to me.

Q. Well, what was his intention, so far as you know?

Mr. Aiken. I object to that.

The Witness. I think he can answer what his intentions are. I don't know what his intentions are.

By Mr. McAtee:

Q. You said you don't think he ever—

Mr. Aiken. Let's take a deposition, Mr. McAtee. Let's take a deposition.

By Mr. McAtee:

Q. Well, he never talked about giving you the property at any time, did he? A. He said if he was going to lose the property to anybody, he would much prefer to lose it to me; therefore he was perfectly willing to make an option of this kind in order to raise additional funds which he needed.

Q. Now, Mr. Fountain, when you moved into this property, what was your income—in 1938?

105 Mr. Aiken. I object to that as immaterial and irrelevant.

The Witness. Do I have to answer that question?

Mr. Aiken. Sure. Go ahead.

The Witness. $2,200.

By Mr. McAtee:

Q. And in 1939? A. About thirty-six.

Q. And 1940? A. About four thousand.

Q. 1941?

Mr. Aiken. I object to that and I am going to instruct my witness not to answer those questions. It is just prying into his personal affairs.

Mr. McAtee. All right. We will abandon that. You may inquire. I haven't anything else to say.

Cross-Examination

By Mr. Aiken:

Q. You stated, Mr. Fountain, that after—from August 1937 until December 1937, you made payments to the building and loan association. What was the nature of those payments? A. They were monthly payments of $60 a month. That was the carrying charge to the building and loan.

Q. Were you paying those as rent or how were you paying them? A. On the basis of rent.

Q. There has been introduced—I am not sure it has been—by your agreement of December 24, 1937, with Mr. Filson, you agreed to pay off a mortgage of $6,000 and a mortgage of $3,000. I believe you have stated you paid off the
106 mortgage of $3,000. Did you pay off the $6,000 mortgage? A. No.

Q. Did you refinance the $6,000 mortgage? A. The $6,000 mortgage was refinanced as a basis—I was paying off the original three.

Q. Will you just state how you paid off the original $3,000 mortgage to your mother? A. Well, in order to refinance that, we had the building and loan give us a new mortgage for a full $6,000, and the difference in the amount which we had paid in was paid to my mother and a new mortgage was executed for the balance.

Q. When was that done? A. In June, I believe, of 1941—or 1940. I am not sure of the date.

(Bond dated June 14, 1941, in the amount of $1,600, was marked Defendants' Exhibit 1 for identification.)

By Mr. Aiken:

Q. I hand you Defendants' Exhibit 1, which is a bond executed by Brainerd Fountain and Anna M. Fountain to Laura S. Fountain, dated June 14, 1941, in the amount of $1,600. I will ask you if that is the new bond executed in favor of your mother at the time you paid off the $3,000 obligation. A. That is correct.

Q. And the $3,000 obligation you paid off at that time is the one referred to in the option agreement dated December 24, 1937; is that right? A. That is right.

Q. As I understand it, in order to get the $1,400 cash that you paid your mother at that time, you executed
107 a new mortgage to the building and loan association in the full amount of $6,000? A. That is right.

Q. Did Mr. or Mrs. Filson sign that new mortgage? A. They did not.

Q. At the time you refinanced the first mortgage, you had paid the bond down far enough so that you could get approximately $1,400; had you not? A. Approximately $1,400.

Mr. Aiken. Now, I will offer into evidence Defendants' Exhibit 1.

By Mr. Aiken:

Q. On December 24, 1937, was your brother, Paul Filson, indebted to you in any amount? A. Not that I recall.

Q. Is the answer to that question no? A. The answer is no.

Mr. Aiken. That is all.

Redirect Examination

By Mr. McAtee:

Q. This paper designated Defendants' Exhibit 1, by which you were to pay your mother $1,600—did that replace the $3,000 mortgage? A. That replaced the $3,000 mort-

gage, having given her cash for $1,400, plus back interest.

Q. You gave this mortgage in substitution for the balance and released the other mortgage; is that correct? A. That is correct.

Q. You still owed her, did you, then, $1,400? A.
108 $1,600.

Q. You have since paid that, have you? A. That is right.

Q. At the time you made this deal with her, what did you owe the building and loan company? A. The mortgage had been reduced over the three-year period to a sufficient amount that I could pay part of the difference that I liquidated to my mother, to wipe out a portion of the $3,000, the rest of it being evidenced here.

Q. In other words, you had paid down your $6,000 mortgage to the building and loan association to the extent of $1,400? A. Not entirely. I had to put up some extra cash besides that. How much, I don't know.

Q. Did you increase that mortgage back to $6,000? A. That mortgage was increased back to $6,000.

Q. Is that on the property now? A. It is on the property now, but not in that amount.

Q. How much balance is there on it now? A. About $3,000.

Q. There is no other encumbrance against the property, is there? A. None that I know of.

* * * * * * * * *

Deposition

113 **Paul Filson,** a witness of lawful age, was thereupon duly sworn and, being examined by counsel, testified as follows:

Direct Examination

By Mr. Aiken:

Q. Now, Mr. Filson, you are the plaintiff in this case, are you not? A. Yes.

Q. You are the brother of the defendant Brainerd Fountain? A. I am.

Mr. Aiken. Will you please mark this Defendants' Exhibit 2?

(Purchase agreement was marked Defendants' Exhibit 2 for identification.)

By Mr. Aiken:

Q. Now, I hand you the document the reporter has marked Defendants' Exhibit 2, which purports to be an agreement between Mary Bethune Prentice and Eloise Valiant Prentice and I will ask you if that is the agreement that you originally signed for the purchase of the property in question. A. It is.

Mr. Aiken. I offer into evidence Defendants' Exhibit 2.

Now, in connection with the testimony of your brother, Brainerd Fountain, there was identified into evidence a contract between yourself and Mr. Fountain dated
114 March 8, 1937, and I take it that counsel agree that is of record for the purpose of this deposition also.

Mr. McAtee. Yes. I have a duplicate here if you want to file it.

(Copy of agreement dated March 8, 1937, between Paul Filson and Brainerd Fountain was marked Defendants' Exhibit 3 for identification.)

Mr. Aiken. I offer into evidence Defendants' Exhibit 3, which is an agreement dated March 8, 1937, between Paul Filson and Brainerd Fountain.

Will you mark this Defendants' Exhibit 4?

(Check was marked Defendants' Exhibit 4 for identification.)

By Mr. Aiken:

Q. Now, Mr. Filson, under the agreement which has been identified as Defendants' Exhibit 3, you agreed to advance

Mr. Fountain $3,000 with which to remodel the house, did you not? A. I did.

Q. As a matter of fact, you did advance him that $3,000, did you not? A. I am under the impression I did. I am not sure.

Q. You would not deny you advanced him $3,000? A. I am not denying it.

Q. About April 5, 1937. If I gave it to him—I was in bed at the time with a heart attack—I don't remember it.

Q. Now, isn't it true, Mr. Filson, that shortly after you advanced him the money, a dispute arose about what repairs were to be made on the house? A. No dispute.

115 Q. Isn't it true, Mr. Filson, that about May 10, 1937, Mr. Fountain paid you back $2,500 of the $3,000? A. If my brother says he gave me $2,500 at that time, he did. I have no recollection of it.

Q. I will hand you Defendants' Exhibit 4, which purports to be a check from B. V. Fountain to Paul Filson, dated May 10, 1937, for $2,500, and I will ask you if that is your endorsement. A. It is my endorsement. The answer to the former question would be yes, in that case.

Q. Isn't it true that Mr. Fountain paid you the balance of the $3,000—paid you back the balance of the $3,000, with the exception of approximately $166, which he had spent in repairs on the house? A. In all probability. I have no recollection of it, though.

Q. You would not deny that? A. I am not denying it, no.

Mr. Aiken. Will you mark this Defendants' Exhibit 5?

(Deed was marked Defendants' Exhibit 5 for identification.)

By Mr. Aiken:

Q. I hand you what has been marked Defendants' Exhibit 5 and I will ask you if that is not the deed you received to the property in dispute. A. It is.

Mr. Aiken. I offer into evidence Defendants' Exhibits 4 and 5.

By Mr. Aiken:

Q. Now, isn't it true, Mr. Filson, that sometime in May 1937 you applied to the Englewood Mutual Building
116 and Loan Association for a loan of $6,000, to be secured by a mortgage on the house? A. I won't specify as to the date. I did apply for that loan.

Q. You applied for that loan in your own name, didn't you? A. That is right.

Q. When you purchased the house you paid $7,000 cash for it? A. That is right.

Q. Isn't it true also about August 20, 1937, the Englewood Mutual Building and Loan Association made you a loan of $6,000, secured by a mortgage on the property? A. I received a loan for $6,000 in August some time.

Q. Some time in August 1937? A. That is right. I couldn't specify as to the exact date.

Q. It is true also, is it not, Mr. Filson, that in July 1937 your brother moved into the premises in question? A. He did.

Q. And at that time the remodeling was not quite complete, was it? A. That is right.

Q. And you had an agreement between you at the time he moved in that he was not to pay any rent until August; isn't that true? A. I have no recollection of a transaction of that kind.

Q. Well, it is true, anyhow, that he didn't pay you any rent until August; isn't that so? A. I don't remem-
117 ber him ever paying any rent.

Mr. Aiken. Will you mark this Defendants' Exhibit 6?

(Check was marked Defendants' Exhibit 6 for identification.)

By Mr. Aiken:

Q. Now, Mr. Filson, I hand you a check which has been marked Defendants' Exhibit 6, dated August 16, 1937, in the amount of $75. On the back of it I see written the words,

"Rent, Paul Filson." A. I have no recollection of that particular transaction.

Q. You would not deny it? A. I am not denying it. There may have been some arrangement. I wouldn't remember it. It is too far back. I was in bed sick for six months or a year prior to this transaction. I have very little recollection of what went on at that time.

Mr. Aiken. I will offer into evidence Defendants' Exhibit No. 6.

By Mr. Aiken:

Q. Now, it is true, is it not, that along the latter part of 1937 you wanted to borrow $3,000 to use in connection with a house of yours in Florida? A. That is not true.

Q. It is true you did try to borrow $3,000 in December 1937? A. You misstate that entirely.

Q. Just answer the question. A. It is not true.

Q. Isn't it true you went to the building and loan association at that time and tried to borrow $3,000 on the
118 house—an extra $3,000 on the house? A. You are misstating that entirely.

Q. Did you borrow money— A. Your original question said I wanted to borrow $3,000 to pay on a house in Florida. The question is improperly put. I went to the building and loan association for the purpose of raising money to the amount of $9,000 for my brother's benefit.

Q. And they refused to loan you the extra $3,000? A. They said they would not loan an additional amount. They said it was not the house I was living in and because of that I couldn't borrow money. It wasn't their policy to loan money for investment purposes.

Q. And you subsequently borrowed the $3,000 from your mother? A. I subsequently took $2,700 from my mother—not $3,000.

Q. She charged you a $300 premium on the loan? A. It was paid for a bonus, as an inducement for her to make the mortgage.

Q. She refused to loan you the money except on condition — A. She never refused to loan me money.

Q. Let me finish the question. I am not trying to hurry you or trick you. I just want the facts. If I don't state the facts correctly in my question just say no.

It is true she refused to loan you the money unless your brother Brainerd signed the note? A. That is not true.

Q. It is true your brother Brainerd Fountain did sign the note that you gave your mother for $3,000; isn't that right?

A. My brother, I believe, participated in the thing as
119 added security for my mother, not because my mother refused to give me the money, but as added security in view of the fact that the house was being transferred to my brother; she wished to be sure that the person who had title to the house would be a party to that particular mortgage, rather than because she didn't want to loan me the money.

Q. Then I take it the answer to the question is that your brother Brainerd did sign the note? A. He did sign the note. Is it a note or is it a bond?

Q. Bond. When I say note I am referring to what in New Jersey is called a bond. A. That is right.

Q. It is true also, however, that he did not sign the mortgage that secured the note; isn't that right? A. You will have to show me the mortgage. I don't recall. You are asking me about things I don't remember. This thing was very hazy. I relied entirely on my brother's honesty to make sure I didn't get stuck, rather than keeping books on this particular transaction. My memory has to be refreshed on a lot of points.

(Photostatic copy of mortgage was marked Defendants' Exhibit 7 for identification.)

By Mr. Aiken:

Q. I will ask you if Defendants' Exhibit 7 does not appear to be a copy of the mortgage signed by yourself and wife at the time you borrowed $3,000 from your mother. A. That is true.

Mr. Aiken. I offer into evidence Defendants' Exhibit 7. Now will you mark this Defendants' Exhibit 8?

120 (Deed was marked Defendants' Exhibit 8 for identification.)

By Mr. Aiken:

Q. I hand you a deed which is marked Defendants' Exhibit 8, and I will ask you if that is not the deed to the property which you gave your brother on December 24, 1937. A. That is true.

Mr. Aiken. I offer into evidence Defendants' Exhibit 8. Will you please mark this Defendants' Exhibit 9?

(Option agreement was marked Defendants' Exhibit 9 for identification.)

By Mr. Aiken:

Q. I hand you an instrument which has been marked Defendants' Exhibit 9 and I will ask you if that is not the option agreement which was executed the same day as the deed, and the same day as the bond and mortgage to your mother. A. That is right.

Q. They were all part of the same transaction, were they not? A. They were.

Q. Now, isn't it true, Mr. Filson, that after December 24, 1937, you didn't pay anything on the taxes or upkeep of the property? A. I didn't pay the taxes nor upkeep on the property.

Q. Nor did you pay anything on the first mortgage? A. Nothing on the first mortgage.

Q. I have here three checks, one dated June 30, 1938, for $45, payable to Mrs. George Fountain; one dated December 22, 1938, payable to Mrs. George Fountain; and one dated July 18, 1939, payable to Mrs. George Fountain. The first one was in the amount of $45, and the last two in the amount of $90 each. It is my understanding that you claim these checks were in payment of interest on the second mortgage. A. They were.

121

Q. I take it these are the only payments of interest you made on the second mortgage? A. There are other ones.

Q. You don't have the checks with you? A. Just at the moment I don't have the checks. I may find them. These I happened to have available. In all probability I could produce more.

Q. Now, isn't it true, Mr. Filson, that in November 1940, you listed this property for sale with real estate agents in Englewood? A. At my brother's request I spoke to several agents about it. I didn't list it.

Q. Isn't it true, Mr. Filson, that you listed the property for sale with R. A. Gorham Company in Englewood? A. I spoke to Mr. Gorham about it, in my brother's behalf, but I never listed the property.

Q. Isn't it true you had them place an advertisement in the Englewood Press, which appeared on November 21, November 28, and December 5, 1940? A. It is not true.

Q. In which you offered the property through them for sale at $10,000? A. It is not true that I had anything to do with any advertisements put in the paper.

Q. Isn't it true, Mr. Filson, that you also listed
122 the property for sale with the firm of Burt, Whistle & Livingston? A. At my brother's request I spoke to several people about it, but I never had any participation in any way with respect to that property.

Q. Isn't it true, also, Mr. Filson, that you listed the property for sale with Lansing & Company? A. Still no. Only as regards my participation on my brother's behalf.

Q. Isn't it true, Mr. Filson, that in the months of November and December you brought a prospective purchaser by the name of Mrs. Hurt to the property several times and attempted to sell the property to her for $10,000? A. I did not. If you wish to have the truth I will tell you about Mrs. Hurt, to save you a lot of confusion later on. Mrs. Hurt wanted a house big enough to put a pipe organ in and I took her up to show her the availability of organ space in that house. No price was discussed at any time.

Q. Now, it is true, Mr. Filson, is it not, that— A. Why do you say "is it true?" Just ask me the question. It requires me to say it is not true.

Q. That is what I want you to say, if it is not so. It is true, is it not, that neither before December 24, 1940, nor since, have you ever tendered $9,000 or offered to pay Mr. Fountain $9,000? A. I had no use for the house. My brother wanted the house and he was to pay me.

Q. Just answer yes or no. Did you or didn't you? A. The answer is, after that explanation, no.

Q. And on December 24, 1937, you were not in-
123 debted to Mr. Fountain in any amount, were you? A. I was not.

Mr. Aiken. That is all.

Cross Examination

By Mr. McAtee:

Q. Did you see this house before you bought it? A. I did not.

Q. Under what circumstances did you buy it? A. Well, I purchased my house from Mr. Prentice and my brother said he would like to have a house to live in in Englewood; I got in touch with Mr. Prentice and was advised by him that his sister had a house for sale. I had a heart attack in December 1936, and I was in bed at home with coronary thrombosis—recovering. I told my brother, I called him in and I said, "Brainerd, go up and look at that house and see if it is the type of house you would like to buy? I understand it can be bought for $7,000." He went up there and looked at it and came back and told me that things could be done to it. Subsequent to that we entered into this agreement.

Q. The agreement of March 1937? A. The agreement of March 1937.

Q. Who prepared that agreement? A. I don't recall. I am under the impression either I prepared it or it was prepared in our home. After this agreement was signed I pro-

ceeded to purchase the house. I didn't purchase the house until this agreement was signed. I had no use for the house.

Q. Up to that time had you seen the house?

124 A. I hadn't seen the house. I let my brother handle the entire thing while I was still in bed. I paid something for this house and my memory has been revived to the extent of remembering I gave Brainerd $3,000 for improvements on this house. Then before I was out of bed or shortly after I was out of bed—I got out of bed in May—my brother told me, "I am sorry, Paul, but you cannot fix the house up for that money." He said, "Here is your money back. I have already made investment of a certain amount," and he gave me that check less the amount he had invested in the house himself. I asked him what I was going to do with the house, that I was in no condition to take care of it, my finances were gone, all the available money I had was invested in this house, and naturally I didn't have enough to complete it, and it necessitated getting the building and loan association to advance the money to complete the payments for the improvements.

Q. What arrangement did you reach with him then? A. He told me he was going to move into the house and he would see what he could do for me. I told him I couldn't keep it up. It was not my idea of a good investment. I consulted him about quite a number of things in connection with the house, in fact, most of them. I built the kitchen cabinets and installed them in his home. I did not charge for that. My dad and I built them in the cellar of our own house and installed them. Then after a while he came to me and said, "Paul, it is too much for me. I cannot carry the house."

I said, "What am I going to do with it?"

So we entered into an agreement whereby I was to turn the house over to him for three years; if before the

125 end of three years someone came along and offered to purchase the property, there was much to be

gained by the sale of the property; he was the only one that could participate in the property. I could not participate because I was limited to the $6,000 balance I had in the house. If the property was sold for $25,000 he was to get all the over-amount. At that time there was an apartment house being talked about being built on the corner just below his house, which would involve the use of 60 feet of this property, 350 feet in depth, which would more than pay for the total cost of the house. When I went over to sign this agreement with the attorney—I spoke to Mr. Morrison about it, I asked him what protection I would have if I turned this house over to him just for the title. He told me we could include in the option the $6,000 balance that I had in there, that my brother would have to give me in the event of a sale. He said, "In the event that the option expires and you didn't take up the option, you would lose your right to buy that property back for $9,000, but you would not lose your $6,000 equity."

Q. Did you employ Mr. Morrison? A. I did not. He was recommended to my mother by a Judge in Fort Lee.

Q. Did she employ him? A. Well, I paid for his services but she was the one that suggested we go over to him, because she wanted someone that no one in the family knew, my brother nor myself. It was her suggestion we go there.

Q. He was a stranger to both of you? A. He was a total stranger. In fact, he is still a stranger to me. That
126 is the only time I ever had anything to do with him.

Q. Had the question of this option been presented to you before Mr. Morrison presented it? A. The question of the option, yes, but the matter of drawing the option was in error. That was the second one. They drew the first one and I refused to sign it because it didn't contain the $6,000 clause.

Q. Who drew that up? A. Mr. Morrison.

Q. Who had him draw that? A. I told him I wouldn't sign it unless I had that option protecting my equity in the property.

Q. Did he discuss putting a third mortgage on the property of $6,000? A. No. The entire transaction was a transaction between brothers. I had all the confidence in the world and I still have all the confidence in the world, in my brother. No; it was a gentlemen's agreement, rather than the necessity for putting that in writing.

Q. Did you ever intend to give your brother $6,000? A. I never did and I am sure he never expected me to.

Q. When you learned that this property was for sale in September of this year, he testified you called him up; is that correct? A. A friend of mine told me that the house was for sale, that was the first I had heard of it. It was not from my brother, but rather from someone else, that he had advertised it in the New York Times, a New York newspaper, not an Englewood newspaper. He had
127 already talked to the person who accepted the deposit the following day for it. My brother never told me anything about it. I had no idea the property was being sold or transferred or even offered for sale. The last word I had from my brother was that he and his wife were going to come back to Englewood and occupy the house. In fact, he had a man working there and the man told me my brother was coming back to live. The following Monday—or that same Monday or Sunday—he accepted a deposit for the sale of the property.

Q. Did you call him about that then? A. I called him about it on the phone to Washington.

Q. What did he say? A. He told me as far as he was concerned I didn't have any equity in the property and that he wanted to think it over.

I said, "Think it over and let me know."

Q. Did he come to see you then? A. A week later he and his wife came to my house and told me they had made up their mind they were going to buy property in Washington. They were going to pay a price over and above the value of the property because of the inflated nature of the market today, and that he felt that the money should

be applied to the purchase of property here in Washington rather than at home.

Q. Did he at that time deny you $6,000 in that property? A. He has never denied I had $6,000 in the property.

Q. Did he ever refuse to pay you $6,000? A. At that time he refused to pay me. The first time I asked him for it—and I was refused.

128 Q. Had he ever refused before that? A. I had never asked before.

Q. After he moved into the property and had taken the deed to it, did you make some substantial improvements to this property? A. No. I helped around with different things. Made the garage a little larger, put a few electrical outlets in, but nothing to amount to anything.

Q. Did you do any sewerage work? A. No. I checked on that and found the sewerage work was done prior to the transfer of the property.

Q. During all those years was this obligation of $6,000 discussed in any way between you? A. Not between my brother and myself at all. He never denied that he owed it to me and he never said he did. He just let it stay at the original agreement whereby he admitted the $6,000 by signing the option.

Mr. McAtee. I guess that is all.

Redirect Examination

By Mr. Aiken:

Q. It is your claim you spent $6,000 in the improvement of the property? A. $6,000 or more. That is over and above the $9,000 he assumed. Actually I spent $9,000 or more in improving the property and $7,000 for the purchase.

Q. Did I understand you to say that you told him you thought the property was a poor investment? A. I beg your pardon. I never said the property was a poor investment. I merely said from my angle it was no good

129 for me. It was not an investment property, a pri-

vate, one family house. A single one-family house is never investment property. A multiple family house, yes; but that would not be my idea of an investment, where the taxes alone are $480 a year.

. . . . . .

Defendants' Exhibit No. 1

144 Filed Oct 1 1947

KNOW ALL MEN BY THESE PRESENTS:

That We, Brainard Fountain and Anna M. Fountain, his wife, of the City of Englewood, in the County of Bergen and State of New Jersey, are held and firmly bound unto Laura S. Fountain, of the Town of Long Hill, in the County of and State of Connecticut, in the penal sum of Three Thousand two hundred dollars ($3,200.00) lawful money of the United States of America, to be paid to the said Laura S. Fountain, her executors, administrators or assigns: for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally firmly by these presents. Sealed with our seals dated the Fourteenth day of June, One Thousand Nine Hundred and Forty-one.

The condition of the above obligation is such that if the above bounden Brainard Fountain and Anna M. Fountain, their heirs, executors or administrators, shall well and truly pay, or cause to be paid unto the above named Laura S. Fountain, her executors, administrators or assigns, the just and full sum of One thousand six hundred dollars ($1,600.00) on the Fourteenth day of June, which will be in the year One Thousand Nine Hundred and Fifty-one and the interest thereon, to be computed from June 14, 1941 at and after the rate of Four (4%) per cent. per annum, and to be paid monthly on the first day of each month in each and every year, without any fraud or other delay, then the above obligation to be void, otherwise to remain in full force and virtue.

. . . . . .

146 Acknowledgment is made that the liquidator of the $1600.00 second mortgage has been paid.

LAURA S. FOUNTAIN.

JAMES M. WEAVER
Notary Public of New Jersey
My Commission Expires Oct. 25, 1945
(Seal)

* * * * * * * * * * *

Defendants' Exhibit No. 2

Filed Oct 1 1947

148 THIS AGREEMENT, made this day of March 4th 1937 between Mary Bethune Prentice (unmarried) and Eloise Valiant Prentice, (unmarried) of the City of Englewood in the County of Bergen and State of New Jersey hereinafter described as the seller and Paul Filson of the City of Englewood in the County of Bergen and State of New Jersey hereinafter described as the purchaser

WITNESSETH, That the seller agrees to sell and convey, and the purchaser agrees to purchase all that lot of land, with the buildings and improvements thereon, situate in the City of Englewood, County of Bergen, State of New Jersey, described as follows:

SHOWN and designated as Lots numbered Six (6) and Seven (7) on a map entitled "Map of Property of Gorham and Jackson, Englewood, N. J." made by H. Birtwhistle, C. E. and filed in the Bergen County Clerk's Office as Map #551.

The sellers represent that the said property is approximately 120 feet in width front and rear by about 350 feet in depth on both sides.

The sellers represent to the purchaser that the said premises are now occupied by one Weygant as a tenant under a lease which expires on the 1st of May, 1937. It is understood and agreed that the purchaser shall have the privilege of taking possession of said premises for the

month of May, 1937 as a tenant without the payment of rent therefor.

149 The price is Seven thousand (7,000) Dollars payable as follows:

Seven hundred (700) Dollars on the Signing of this contract, the receipt of which is hereby acknowledged.

Six thousand three hundred (6,300) Dollars in cash on the delivery of the deed, as hereinafter provided.

* * * * * * * * * * *

150 The deed shall be delivered and title passed at the office of Huckin & Huckin, 1 Engle Street, Englewood, N. J., on or before June 1st, 1937 at 2 o'clock afternoon.

* * * * * * * * * * *

Defendants' Exhibit No. 3

152 Filed Oct P1947

(Exhibit C to Amended and Supplemental Complaint)

(Fountain Exhibit No. 1)

AGREEMENT

This agreement, dated this 8th day of March, 1937, between Paul Filson, of Englewood, New Jersey, hereafter known as the party of the first part, and Brainard Fountain, of Westwood, New Jersey, hereafter known as the party of the second part,

WITNESSETH:

That for and in consideration of the sum of one dollar and other good and valuable considerations, the party of the first part agrees to do and perform the following:

To advance the sum of seven thousand dollars ($7,000) for purchase of the property known as 71 Linden Avenue, Englewood, New Jersey, together with all land connected thereto. The dimensions of the land and adjoining plot are approximately 120 feet facing Linden Avenue, and 360 feet depth.

Title to said property is to be taken in the name of the party of the second part and the party of the second part agrees to furnish bond and mortgage in the sum of seven thousand dollars ($7,000), plus the further agreed amount to be used for purposes of repairing and improving said property, the amount of said bond and mortgage not to exceed ten thousand dollars, ($10,000).

The party of the first part agrees to give a clear title to the above mentioned property and to give title to the party of the second part on or before June 1st, 1937.

The party of the first part further agrees to deposit to the account of the party of the second part the sum of $3,000 (three thousand dollars), as herein provided, to be used for the aforementioned improvements and repairs on buildings and premises.

In the event of the death of the party of the first part prior to the completion of this agreement, the party of the first part makes his agreement a part of his last will and testament and it is his wish that the executors of his estate comply faithfully with the terms and conditions of this agreement.

The party of the first part agrees not to interfere in any way with the disposition of the three thousand dollars ($3,000) as herein provided.

The party of the first part agrees to accept a mortgage in the amount or amounts herein provided for a term of eleven years, with an option of an extention period of five years, provided interest and taxes have been paid within the legally prescribed period.

The party of the first part further agrees that in the event of death or illness of the party of the second part, to carry said mortgage without interest for a period not exceeding three years and, if necessary, the party of the first part agrees to assume taxes and other incumbrances on the property for the same three year period.

The party of the first part agrees that in the event of the loss of position of the party of the second part, or if for

some reason beyond his control his earning capacity is diminished or lessened, the party of the first part will pay taxes and assessments on the property and likewise waive interest on the mortgage for a like period.

The party of the second part agrees to do and perform the following:

To take title to said premises in his and his wife's name on or before June 1, 1937, and to assume all taxes, assessments on the property, and interest on the aforementioned sum of seven thousand dollars ($7,000), plus portion of the sum of $3,000 (three thousand dollars), given to him for uses as herein provided; and on or before August 1, 1937, to execute a mortgage to the party of the first part in the sum and sums as herein provided, said mortgage not to exceed $10,000 (ten thousand dollars).

153 He further agrees to improve said property so as not to endanger the sums advanced to him by the party of the first part.

He further agrees to pay interest on the total amount of the mortgage at the rate of 4% per annum, interest period beginning October 1, 1937, interest payments to be semi-annually and to continue through the duration of the mortgage as herein provided, the semi-annual interest to be computed on the basis of 4% of the amount of the mortgage at the semi-annual period, allowing for payments on principal reducing the total amount of the mortgage.

The party of the second part has the privilege of making payment or payments on the mortgage at any time, reducing all or part of the mortgage prior to the termination of the mortgage, if he so desires.

Party of the second part agrees to pay all expenses in connection with the transfer, search of title, and other incidental expenses on the purchase and transfer of the property.

Both parties agree to the following:

That upon the execution by the party of the second part of the above agreed bond and mortgage, this agreement is

terminated, and its terms and conditions are to be embodied in the said bond and mortgage.

Signed PAUL FILSON
Party of the first part.

Signed BRAINARD FOUNTAIN.
Party of the second part.

Defendants' Exhibit No. 4

154 Filed Oct 1 1947

Number

The Citizens National Bank and Trust Company
Englewood, N. J. May 10 1937

Pay to the order of Paul Filson $2500
Twenty five hundred and no— Dollars

Br Fountain

[Endorsed] Paul Filson

Defendants' Exhibit No. 5

155 Filed Oct 1 1947

This Indenture,

Made the 12th day of May, in the year of our Lord One Thousand Nine Hundred and thirty-seven

Between

Mary Bethune Prentice (Unmarried)
Eloise Valiant Prentice, (unmarried),

Paul Filson, of the City of Englewood, in the County of Bergen and State of New Jersey, party of the second part;

Witnesseth, That the said party of the first part, for and in consideration of the sum of One Dollar ($1.00) lawful money of the United States of America, and other valuable considerations, to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby ac-

knowledged, and the said party of the first part being therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part, and to his heirs and assigns, forever, All those certain lots, tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the City of Englewood in the County of Bergen and State of New Jersey Shown and designated as Lots numbered Six (6) and Seven (7) on a map entitled "Map of Property of Gorham and Jackson, Englewood, N. J." made by H. Birtwhistle, C. E. and filed in the Bergen County Clerk's Office as Map No. 551; being the same premises conveyed to the said Mary Bethune Prentice and Eloise Valiant Prentice by Leonard van den Honert and his wife, by deed dated March 15th, 1932 and recorded in the Bergen County Clerk's Office in Book 1830 of Deeds, on pages 611 &c.

* * * * * * * * * *

156 To have and to Hold, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever:

* * * * * * * * * *

157 Received in the Clk's Office of the County of Bergen N J on the 19 day of May A. D., 1937, at 1.46 o'clock, in the afternoon, and Recorded in Book 2047 of DEEDS for said County, on page 487 &c.

JAMES W. MERCER
County Clerk

* * * * * * * * * *

Defendants' Exhibit No. 6

158 Filed Oct 1 1947

No. ..... New York, Aug. 16 1937

Grace National Bank 1-280
of New York
7 Hanover Square, New York

Pay to the order of Paul Filson $75.00
Seventy five and No Dollars

Br Fountain

[Endorsed] Rent Paul Filson

* * * * * * * * * *

Defendants' Exhibit No. 7

159 Filed Oct 1 1947

This indenture made the twenty four day of December in the year of our Lord one thousand nine hundred and thirty seven Between Paul Filson and Anna Filson his wife of the City of Englewood in the County of Bergen and State of New Jersey hereinafter known as the mortgagor And Laura S Fountain of the City of Englewood in the County of Bergen and State of New Jersey hereinafter known as the mortgagee

The words "mortgagor" and "mortgagee" shall include the respective party or parties hereto their heirs executors administrators successors and assigns

Whereas the said mortgagor is justly indebted to the said mortgagee in the sum of three thousand ($3,000) dollars in gold coin of the United States of America secured to be paid by a certain bond or obligation of the said mortgagor bearing even date with these presents on the twenty fourth day of December one thousand nine hundred and forty and the interest thereon to be computed from the date hereof at and after the rate of six per centum (6%) per annum to be paid semi-annually on the 24th day of June next ensuing the date hereof and semi-annually thereafter, and it is agreed between the mortgagor and the mortgagee, that the mortgagor shall have the privilege of paying the principal

in whole or in part at any time prior to the due date in gold coin as aforesaid without any fraud or other delay as by the said bond or obligation and the condition thereof may more fully appear

Now this indenture witnesseth that the said mortgagor for the better securing of the said payment of money mentioned in the condition of the said bond or obligation with interest thereon according to the true intent and meaning there of and also for and in consideration of the sum of one dollar to the said mortgagor in hand paid by the said mortgagee at or before the unsealing of these presents the receipt whereof is hereby acknowledged has granted bargained sold aliened released conveyed and confirmed and by these presents does grant bargain sell alien release convey and confirm unto the said mortgagee and the heirs successors and assigns of the said mortgagee forever;

All that tract of land and premises hereinafter particularly described, situate, lying and being in the City of Englewood, County of Bergen and State of New Jersey, Shown and designated as Lots numbered six (6) and seven (7) on a map entitled "Map of Property of Gorham and Jackson, Englewood, N. J." made by H. Birtwhistle, C. E. and
160 filed in the Bergen County Clerk's Office as Map No. 551; being the same premises conveyed to Mary Bethune Prentice and Eloise Valiant Prentice by Leonard van den Honert and his wife, by deed dated March 15th, 1932 and recorded in the Bergen County Clerk's Office in book 1830 of deeds, on pages 611 &c. Subject, however, to a first mortgage originally in the sum of $6000. made by Paul Filson and Anna Filson, his wife, to the Englewood Mutual Building and Loan Association of Englewood, New Jersey.

* * * * * * * * *

Received in the office and recorded Dec. 24, 1937 at 2:28 P. M.

JAMES W. MERCER,
Clerk.

This mortgage is paid off and discharged as appears by the original being produced to me cancelled.

June 16 1941

JAMES W. MERCER
Clerk

Filed Oct 1 1947

Defendants' Exhibit No. 8

(Exhibit A to Amended and Supplemental Complaint)

THIS INDENTURE, Made the 24th day of December, in the year of our Lord One Thousand Nine Hundred and thirty-seven between Paul Filson and Anna F. Filson, his wife, of 92 Knickerbocker Road of the City of Englewood in the County of Bergen and State of New Jersey, party of the first part:

And Brainard Fountain and Anna M. Fountain, his wife, of 71 Linden Avenue, City of Englewood, County of Bergen and State of New Jersey, party of the second part:

WITNESSETH, That the said party of the first part, for and in consideration of One ($1.00) Dollar and other valuable consideration lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part being therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant bargain, sell, alien, release, enfeoff, convey and confirm unto the

said party of the second part, and to their heirs and assigns, forever, all those certain lots, tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the City of Englewood in the County of Bergen and State of New Jersey

Shown and designated as Lots numbered Six (6) and Seven (7) on a map entitled "Map of Property of Gorham and Jackson, Englewood, N. J." made by H. Birtwhistle, C. E. and filed in the Bergen County Clerk's Office as Map #551:

Said premises are conveyed subject to the lien of two mortgages, one made by Paul Filson and Anna Filson, his wife, to the Englewood Mutual Building and Loan Association of Englewood, New Jersey, in the sum of $6,000.00, and the second made by Paul Filson and Anna Filson, his wife, to Laura S. Fountain, dated December 24, 1937, in the sum of $3,000.00, which mortgages, the party of the second part hereby assume the agree to pay.

166 Together with all and singular the houses, buildings, trees, ways, waters, profits, privileges, and advantages, with the appurtenances to the same belonging or in anywise appertaining;

Also, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof,

To have and to hold, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, their heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, their heirs and assigns forever;

And the said Paul Filson and Anna F. Filson, his wife, do for themselves, their heirs, executors and administrators covenant and agree to and with the said party of the second part, their heirs and assigns, that they the said Paul Filson and Anna F. Filson, his wife, are the true, lawful and right owners of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and

that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever;

AND ALSO that the said party of the first part now have good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid;

AND ALSO, that Paul Filson and Anna F. Filson, his wife, will Warrant, secure, and forever defend the said land and premises unto the said Brainard Fountain and Anna M. Fountain, his wife, their heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever.

IN WITNESS WHEREOF, the said party of the first part have hereunto set their hands and seals the day and year first above written.

Signed, Sealed and Delivered
in the Presence of
ARTHUR J. O'SHEA

PAUL FILSON (Seal)
ANNA F. FILSON (Seal)

Received in the Clerk's Office of the County of Bergen, N. J., on the 24th day of December A. D., 1931, at 2:20 o'clock in the afternoon and Recorded in Book 2091 of Deeds for said County, on page 516 &c.

JAMES W. MERCER,
County Clerk.

Record charge & return to Morrison, Lloyd & Morrison, 210 Main St., Hackensack.

Defendants' Exhibit No. 9

(Exhibit B to Amended Supplemental Complaint)

168 Filed Oct 1 1947 Harry M. Hull, Clerk

By this agreement made this 24th day of December, 1937, by and between Brainard Fountain and Anna M. Fountain, his wife, hereinafter called the Optionor, and Paul Filson and Anna F. Filson, his wife, hereinafter called the Optionee;

Witnesseth That,

Whereas, the Optionee has this 24th day of December, 1937, conveyed the premises hereinafter described, to the Optionor in consideration of the assumption by the Optionor of two mortgages, which are now liens on said premises, and

Now, Therefore, In consideration of the premises and One ($1.00) Dollar paid by the Optionee to the Optionor, the receipt whereof is hereby acknowledged, the Optionor does hereby give the Optionee first option for three years, from the date hereof, to repurchase the premises hereinafter described, for the sum of Nine Thousand ($9,000.00) Dollars;

And it is further Agreed between the Optionor and the Optionee, that this option may be terminated upon payment to the Optionee of the sum of Six Thousand ($6,000.00) Dollars in cash or certified check;

And it is further Agreed that this option covers the following described premises:

169 All those certain lots, tracts or parcels of lands and premises, situate, lying and being in the City of Englewood, County of Bergen and State of New Jersey.

Shown and designated as Lots numbered Six (6) and Seven (7) on a map entitled "Map of Property of Gorham and Jackson, Englewood, N. J." made by H. Birtwhistle, C. E. and filed in the Bergen County Clerk's Office as Map #551.

In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

Signed, Sealed and Delivered
in the Presence of:
Arthur J. O'Shea

Brainard Fountain (Seal)
Anna M. Fountain (Seal)
Paul Filson (Seal)
Anna F. Filson (Seal)

171 Received in the Office of the Clerk of Bergen County, New Jersey, on the 24 day of Dec. A. D. 1937 at 2:31 o'clock P.M. and recorded in Book 2091 Page 318 &c of Deeds.

James W. Mercer,
County Clerk.

Fountain Exhibit No. 2

172 Know All Men by These Presents, that Paul Filson and Anna Filson, his wife, and Brainard Fountain, all of the City of Englewood, in the County of Bergen and State of New Jersey, hereinafter known as the obligor is held and firmly bound unto Laura S. Fountain, of the City of Englewood, in the County of Bergen and State of New Jersey, hereinafter known as the obligee in the sum of Six Thousand ($6,000) Dollars in gold coin of the United States of America to be paid to the said obligee: for which payment well and truly to be made the said obligor is bound firmly by these presents. The words "obligor" and "obligee" shall include the respective party or parties hereto, their heirs, executors, administrators, successors and assigns. Sealed with the seal of the said obligor and dated the twenty-fourth day of December, one thousand nine hundred and thirty-seven.

The condition of the above obligation is such that if the above bounded obligor shall well and truly pay or cause to be paid unto the above named obligee the just and full sum of Three Thousand ($3,000) Dollars in gold coin of the United States of America at the present legal standard of weight and fineness on the 24th day of December, one thousand nine hundred and forty and the interest thereon to be computed from the date hereof at and after the rate of six per centum (6%) per annum and to be paid semi-annually on the 24th day of June next ensuing the date hereof and semi-annually thereafter.

. . . . . .

Excerpt from Proceedings

33 Mr. McAttee: Now, I will add, for Your Honor's information here, that Mrs. Fountan, the mother of these boys, has died in the interval. I think she died after the institution of this action, or about that time.

Mr. Morrison, the lawyer, whom I spoke of in Hackensack, who drew this deed, is likewise dead. Mr. Fountain, the beneficiary of this transaction is likewise dead.

United States Court of Appeals

FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 9664

PAUL FILSON AND ANNA F. FILSON, HIS WIFE, APPELLANTS

v.

ANNA M. FOUNTAIN, APPELLEE

Appeal from the District Court of the United States for the District of Columbia (now United States District Court for the District of Columbia).

Argued May 10, 1948 Decided October 18, 1948

Mr. Camden R. McAtee for appellants.

Mr. William M. Aiken for appellee.

Before EDGERTON, CLARK and WILBUR K. MILLER, JJ.

CLARK, J.: This is an appeal from a dismissal in the District Court of a civil action, by one brother against another, for adjudication, recovery and enforcement of a claim for $6,000 as his unsatisfied equity arising out of a deed, related writings and transactions between the brothers with reference to certain improved real estate in New Jersey.

Paul Filson and Brainard Fountain were brothers, Filson having taken the name of his adoptive parents. In March of 1937, Filson, then bedridden, purchased a house and lot in Englewood, New Jersey, for $7,000 cash.[1] On March 8, 1937, four days after the date of the contract of sale of the property to Filson,[2] the brothers executed in New Jersey a written agreement by which Filson agreed to give clear title to Fountain and wife by June 1, 1937, and also agreed to give the Fountains $3,000 to be used by the Fountains for improvement of the property. In return, the Fountains agreed to take title to the premises and to give back an eleven-year mortgage in an amount not exceeding $10,000. Shortly after the execution of this agreement

[1] In a deposition later taken in contemplation of the instant litigation, Filson testified that he had no use for the property and had not even seen it prior to his purchase but that he bought it in reliance upon representations by Fountain who handled the entire matter while Filson was ill in bed, Fountain having told Filson that he (Fountain) would like to have a home in Englewood.

[2] Although the contract of sale is dated March 4, 1937, title to the property was transferred to Filson by warranty deed dated May 12, 1937.

Filson did give Fountain $3,000 for improvements but this amount, less about $166, was soon returned by Fountain who indicated that the house could not be adequately improved for that amount. Nothing further was done under the agreement by either party thereto and that agreement was apparently abandoned by tacit understanding between the parties.

Sometime in May of 1937, Filson applied for, and in August received, a $6,000 building and loan mortgage on the premises. Late in July, 1937, Fountain and wife moved into the premises, which were then still being remodeled by Filson. From August to December the Fountains paid rent in the form of monthly payments on the building and loan mortgage. In October, the improvements were completed at a total cost to Filson of about $8,000.

On December 24, 1937, Filson borrowed $3,000 from his (and Fountain's) mother, giving in return a second mortgage on the premises. Fountain also signed the bond in that transaction allegedly as additional security to the mother. That same day, Filson and wife deeded the property to Fountain and wife in consideration of the Fountains' assumption of the two mortgages. This deed was absolute in form, reciting an express consideration with habendum to the use of the grantees, their heirs and assigns forever. There was executed simultaneously with the deed to the Fountains an option agreement whereby, for a recited consideration, the Fountains agreed to give the Filsons a three-year first option to repurchase the property for $9,000. It was also agreed between the parties at that time and in writing that the option to repurchase may be terminated by payment to the Filsons of $6,000. This option was never exercised by either party and expired on December 24, 1940. It was Fountain's testimony by deposition that Filson agreed (apparently orally) to pay interest on the second mortgage and that Filson did partially pay such interest during 1938 and 1939.

In June, 1940, the Fountains refinanced the two mortgages by paying off and discharging completely the second mortgage and by making a new mortgage in the amount of $6,000 to the building and loan association. This latter mortgage is the only remaining encumbrance on the property and it had, at the time this litigation commenced, been about half paid off.

Without notice of any kind to the Filsons, the Fountains offered the property for sale in August, 1945. A buyer was found and a contract of sale drawn up, but this sale was never consummated due, according to Fountain's testimony, to the buyer's inability to pay the agreed price ($15,600) and the Fountains still have title to the property. As soon as Filson learned of the proposed sale he called Fountain, who was then living in Washington, D. C., and inquired about his ('the Filsons') equity in the property. Fountain then told Filson that he believed Filson had no remaining equity in the property.[3]

The depositions of Filson and of Fountain, from which the bulk of the foregoing information was gleaned, were taken in Washington on November 19, 1945.

[3] Fountain testified that in a later conversation concerning this equity he told Filson that all the Fountains were doing was transferring the proceeds from the sale of the house in Englewood to the purchase of a house in Washington, D. C.

In their complaint, filed below in 1946, the Filsons allege that the conveyance to the Fountains was for a principal consideration of $15,000, to be evidenced by the Fountains' assumption of $7,000 in mortgages and the further payment of $6,000 by the Fountains to the Filsons. Accordingly, recovery was sought on the theory of a resulting trust in favor of the Filsons in the amount of $6,000 plus interest. Fountain, joint defendant with his wife, died after this action was instituted. The Filsons moved to substitute in his place his wife in her representative capacity. This motion was denied for want of prosecution. In May, 1947, the matter came on for hearing on the defendant's motion for summary judgment and on plaintiffs' motion to vacate the order denying the motion for substitution. Summary judgment was given for defendant Fountain and plaintiffs' motion to vacate was denied. The trial judge entered no findings of fact and no conclusions of law, but these are not required in the circumstances of this case.[4]

Since the land involved in this suit is in New Jersey, the law of that state must govern any decision here with regard to the interests, legal or equitable, of the parties in that property, and all parties concede that this is so. As indicated above, the complaint filed below sought equitable relief in the form of a declaration of a resulting trust in favor of the Filsons. The trial court refused to grant this relief and sustained the defendant's motion for summary judgment, relying, according to the parties, on the case of *Down* v. *Down*, 80 N. J. Eq. 68, 82 Atl. 322 (N. J. Ch. 1912).[5] In that case a husband and wife joined in an absolute conveyance of land to a third party who was a mere conduit of title and who in turn conveyed absolutely to the wife. Each of the two conveyances was absolute in form, recited a specific money consideration and was to the use of the grantee. In construing the effect of these conveyances, the New Jersey court held that both legal and equitable title to the land was in the wife and that no resulting trust could arise in favor of the husband. The following rule of law is stated in the *Down* case:

> "But, should it be thought that the views above expressed too closely confine the field of operation of resulting trusts, I think it is clear that the accepted doctrine that a resulting trust cannot arise in favor of a grantor, in the absence of fraud, under a deed of conveyance expressing a money consideration, with declaration to the use of the grantee, must be regarded as operative to deny relief to cross-complainant in this suit."[6]

This is the prevailing law of New Jersey as to resulting trusts.[6] Applying the facts of the instant case to the principle above set forth it is immediately apparent that the trial court in this case correctly ruled, by implication, that there was no resulting trust in favor of the Filsons because the deed of December 24, 1937, recited

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[4] "Since a summary judgment presupposes that there are no triable issues of fact, findings of fact and conclusions of law are not required in rendering judgment, although the court may make such findings with or without request. Failure to make and enter findings and conclusions is not error." *Lindsey* v. *Leary et al.*, 149 F. 2d 899, 902 (C. C. A. 9th, 1945).

[5] 82 Atl. at p. 324.

[6] See also, *Sarge et al.* v. *Lemberger et ux.*, 92 N. J. Eq. 656, 114 Atl. 454 (N. J. Err. & App. 1921); *Brown et al.* v. *Murray et al.*, 94 N. J. Eq. 125, 118 Atl. 584 (N. J. Ch. 1922).

an express consideration and granted the property to the use of the grantee Fountains. However, it does not follow from this that the Filsons should be denied all relief as was done by the trial court in this case. The record shows that the Filsons' complaint contained a general prayer for "all other relief to which they appear entitled." This was sufficient to entitle them to any other appropriate relief which may be granted by a court of equity.[7] We believe that the Filsons are entitled to other relief and hence that the trial court erroneously granted summary judgment to defendant Fountain.

Although we believe this to be an ill-advised suit in this jurisdiction in that it should have been instituted in New Jersey, the situs of the land, yet, having admitted personal jurisdiction over all parties, we can and shall order judgment to be rendered *in personam* against Mrs. Fountain, present appellee. It is clear from the record that Filson invested at least $15,000 in Englewood property having paid an initial $7,000 for the property and having improved it at a cost of at least $8,000.[8] It is conceded by all parties that the only consideration paid by the Fountains to the Filsons for the absolute conveyance of the property to the Fountains was the assumption by the Fountains of the $9,000 in mortgages. Fountain testified that the Filsons agreed orally to pay, and did pay, part of the interest on the mortgages. It is thus apparent that the Filsons were "out of pocket" *at least* $6,000 as a result of the above-described transactions. Filson testified that he never intended this $6,000 as a gift to his brother and that Fountain never expected him to make such a gift. When asked if Filson intended to give him the $6,000, Fountain replied: "I don't think he ever intended to give it to me." Fountain also stated that he had never paid the Filsons the $6,000. The option agreement was drawn up by a New Jersey attorney now dead. When questioned about this agreement, Filson stated as follows:

> "When I went over to sign this agreement with the attorney I spoke to Mr. Morrison [the attorney] about it. I asked him what protection I would have if I turned this house over to him [Fountain] just for the title. He told me we could include in the option the $6,000 balance that I had in there, that my brother would have to give me in the event of a sale. He said, 'In the event that the option expires and you didn't take up the option, you would lose your right to buy that property back for $9,000 but you would not lose your $6,000 equity.'"

We believe that all of the above-recited circumstances taken together clearly show an acknowledged indebtedness of the Fountains to the Filsons in the amount of $6,000. The expiration of the option to repurchase unexercised had no effect upon the indebtedness. The

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[7] In *Helvestine* v. *Helvestine*, 67 App. D. C. 121, 122, 89 F. 2d 979 (1937), this court said:

> "It is settled law that 'if the plaintiff should mistake the relief to which he is entitled in his special prayer, the court may yet afford him the relief to which he has a right, under the prayer of general relief, provided it is such relief as is agreeable to the case made by the bill.'"

[8] Appellee asserts on appeal that it is not conceded that the improvements cost $8,000. However, Fountain's own statements by deposition show that he could not improve the premises for $3,000, that he was shown all bills for improvement and did not object thereto, and that Filson had spent between $15,000 and $16,000 on the property.

option agreement did not create the indebtedness but was merely evidence thereof and thus its expiration did not and could not destroy or otherwise affect the indebtedness. By the expiration of the three year option to repurchase Filson lost the right to repurchase for $9,000 and that is all he lost and all that the parties intended he should lose.

The lower court, sitting as a court of equity, had personal jurisdiction over all the parties and had before it all of the various documents from which this controversy arose in addition to the extensive depositions of Filson and Fountain. It has long been an established rule that the decrees of a court of equity are *in personam* and may be enforced in all cases where the parties are within its jurisdiction despite the fact that the *res* of the controversy is or may be beyond the territorial jurisdiction of the tribunal.[9] It is equally true that a court of equity, having once acquired jurisdiction, will retain it to do complete justice. The court below should have found an indebtedness by the Fountains to the Filsons in the amount of $6,000 plus interest, and then rendered personal judgment against Mrs. Fountain in that amount, since a personal money judgment would be, under the circumstances of this case, the most effective and complete remedy possible. For failure so to do, we must reverse the judgment entered below.

Appellants assert also as error the denial of the motion to substitute Mrs. Fountain in her representative capacity for her husband, the latter having died since the suit was instituted. We agree with appellants that this too was error. Title to the Englewood property was in the names of Anna and Brainard Fountain jointly. Their indebtedness was also joint. The facts that under New Jersey law the Fountains became tenants by the entireties and that under that law Mrs. Fountain took no additional interest in the land from her husband upon his death[10] do not diminish Mrs. Fountain's responsibility as administratrix of her husband's estate to satisfy his existing debts of which this joint indebtedness for $6,000 was one. Appellee concedes that this is true if we find, as we have, that Brainard Fountain had assumed the $6,000 obligation.

In ruling as we do we recognize that a court of equity is generally reluctant to grant a mere recovery of money, but we believe that this case is one peculiarly within the concurrent jurisdiction of equity since the remedy at law is not certain, complete and sufficient.[11]

Accordingly, the judgment rendered below is hereby reversed in all respects and remanded to the District Court with instructions to grant the motion for substitution and to enter judgment in the amount of $6,000 plus interest in favor of the Filsons against Mrs. Fountain individually and as administratrix of the estate of Brainard Fountain.

Reversed and remanded with instructions.

[9] *Phelps* v. *Mcdonald*, 99 U. S. 298; 25 L. Ed. 473 (1879); *Alger* v. *Murray*, 105 U. S. 126, 26 L. Ed. 942 (1882); *Gilbert et al* v. *Beach et al.*, 42 F. Supp. 168 (D. C. 1941), *affirmed sub nomine Beach* v. *Gilbert et al.*, 77 U. S. App. D. C. 117, 133 F. 2d 50 (1943); *Indemnity Ins. Co.* v. *Smoot*, 80 U. S. App. D. C. 287, 152 F. 2d 667 (1945), *cert. denied* 328 U. S. 835, 66 Sup. Ct. 981, 90 L. Ed. 1611 (1946).

[10] See *In re Stanger's Estate*, 104 N. J. Eq. 149, 144 Atl. 619 (N. J. Ct. of Err. & App. 1929).

[11] See 1 POMEROY'S EQUITY JURISPRUDENCE (Symons' 5th Ed. 1941) §§ 178 *et seqs.* particularly § 180.

[fol. 67] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Oct. 18, 1948. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, OCTOBER TERM, 1948

No. 9664

PAUL FILSON and ANNA F. FILSON, His Wife, Appellants,

vs.

ANNA M. FOUNTAIN, Appellee

Appeal from the District Court of the United States for the District of Columbia (Now United States District Court for the District of Columbia)

Before Edgerton, Clark and Wilbur K. Miller, JJ.

JUDGMENT

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, now United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and it is hereby, remanded to the said District Court with instructions to grant the motion for substitution and to enter judgment in accordance with the opinion of this Court.

Per Circuit Judge Clark.

Dated October 18, 1948.

[fol. 68] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Dec. 16, 1948. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, OCTOBER TERM, 1948

No. 9664

PAUL FILSON and ANNA F. FILSON, His Wife, Appellants,

vs.

ANNA M. FOUNTAIN, Appellee

Before Edgerton, Clark and Wilbur K. Miller, JJ.

ORDER

On consideration of appellee's motion for modification of judgment herein, of appellants' objections to the motion and of appellee's reply thereto, It is

Ordered by the Court that the motion be, and it is hereby, denied.

Per Curiam.

Dated December 16, 1948.

[fol. 69] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Jan. 7, 1949. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 9664

PAUL FILSON and ANNA F. FILSON, His Wife, Appellants,

v.

ANNA M. FOUNTAIN, Appellee

ORDER

Upon motion of the appellee, it is ordered that the issuance of the mandate in this case be, and it is hereby, stayed for thirty days pending appellee's application to the Supreme

Court of the United States for the issuance of a writ of certiorari.

Per Curiam.

Dated January 7, 1949.

[fol. 70] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Jan. 26, 1949. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 9664

PAUL PILSON and ANNA F. PILSON, His Wife, Appellants,

v.

ANNA M. FOUNTAIN, Appellee

DESIGNATION OF RECORD

In the above-entitled case appellee designates the following parts of the record to be prepared in connection with the petition for certiorari she intends to file in the United States Supreme Court:

1. Joint appendix attached to appellant's brief in the Court of Appeals.
2. Opinion of the Court of Appeals.
3. Judgment of the Court of Appeals.
4. Order of the Court of Appeals denying motion for modification of the judgment.
5. Order of the Court of Appeals staying issuance of the mandate for thirty days.

Respectfully submitted, William M. Aiken, Attorney for Appellee, by Charles A. Horsky, Of Counsel, 701 Union Trust Building, Washington 5, D. C.

Covington, Burling, Rublee, Acheson & Shorb, Of Counsel.

[fol. 71] I certify that I have served the foregoing Designation of Record on Mr. Camden R. McAtee, attorney for appellants, by mailing a copy thereof, postage prepaid, to

his office at 1021 Tower Building, Washington, D. C., on this 26th day of January, 1949.

Charles A. Horsky.

[fol. 72] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit, formerly United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered 1 to 71, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties, and the proceedings of the said Court of Appeals as designated by counsel in the case of Paul Filson and Anna F. Filson, his wife, Appellants, v. Anna M. Fountain, Appellee, No. 9664, January Term, 1949, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this first day of February, A. D. 1949.

Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit.
(Seal.)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

542

No. 542

ANNA M. FOUNTAIN,

Petitioner,

vs.

PAUL FILSON AND ANNA F. FILSON

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

WILLIAM M. AIKEN,
CHARLES A. HORSKY,
Counsel for Petitioner.

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Citations

Cases:

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 542

ANNA M. FOUNTAIN,

Petitioner,

vs.

PAUL FILSON AND ANNA F. FILSON,

Respondents

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Opinions Below

The District Court filed no opinion. The opinion of the Court of Appeals (R. 62) is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered October 18, 1948 (R. 67) and on December 16 the court denied petitioner's timely motion for modification of the judgment (R. 68). The jurisdiction of this Court is invoked under 28 U. S. C. §§1254(1) and 2101(c).

Questions Presented

1. When a District Court has granted defendant's motion for summary judgment and the plaintiff made no parallel motion, does the Court of Appeals, in reversing, have power also to direct entry of judgment for the plaintiff?

2. If such power does exist, was its exercise appropriate in this case?

Statement of the Case

Respondents filed suit against petitioner and her husband, since deceased, in the District Court for the District of Columbia (R. 2). In essence they claimed a $6,000 interest in New Jersey realty which they had conveyed to petitioner and her husband in 1937. The prayer was for the declaration of a resulting trust and incidental relief.

After answer (R. 6) and the taking of discovery depositions from petitioner's husband (R. 14) and the plaintiff Paul Filson (R. 34), petitioner moved for summary judgment under Rule 56 of the F.R.C.P. (R. 11). The sole ground for the motion was that two written instruments, the deed of conveyance and a three-year repurchase option, were controlling and did not give rise to a resulting trust under New Jersey law. Respondents made no cross-motion for summary judgment. The trial court granted petitioner's motion and rendered judgment in her favor (R. 13).

The Court of Appeals, speaking through Judge Clark, agreed that there was no resulting trust. Relying, however, on a legal theory never propounded by respondents, the court held that the written instruments were not controlling in view of the presence in the record of evidence indicating an "acknowledged indebtedness" of $6,000 from petitioner and her deceased husband to respondents. The court therefore reversed the District Court's judgment (R. 67).

The Court of Appeals did not stop there, however. It proceeded to weigh the evidence and to direct entry of judgment for respondents (R. 66, 67). Yet nowhere in its otherwise detailed opinion was there any discussion of the propriety of this direction.[1] Petitioner promptly moved for modification of the judgment on the ground that the Court of Appeals could not and should not do more than remand the case for further proceedings, but the motion was denied without opinion (R. 68).

Reasons for Granting the Writ

1. *This case raises an important question of federal procedure which has not been, but should be, settled by this Court.*

Twice in the last two Terms the Court has had occasion to consider the impact of the Civil Rules on the power of a Circuit Court of Appeals to direct entry of judgment for a party who has lost in the District Court. *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571 (1948); *Cone* v. *West Virginia P. & P. Co.*, 330 U. S. 212 (1947).

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[1] The nearest the court came to this issue was in the following statement (R. 65):

> "Although we believe this to be an ill-advised suit in this jurisdiction in that it should have been instituted in New Jersey, the situs of the land, yet, having admitted personal jurisdiction over all parties, *we can and shall* [italics added] order judgment to be rendered *in personam*. . . ."

Later the court said (R. 66):

> "The court below should have found an indebtedness . . . and then rendered personal judgment against Mrs. Fountain . . . since a personal money judgment would be . . . the most effective and complete remedy possible."

From the language and the context it is clear that the first quotation concerned the jurisdiction of the District Court and the second concerned either the same question or the power of a court of equity to grant a money judgment. The court did not even mention Rule 56. The case was treated, in short, as though it had been fully tried in the District Court.

In each case the question was whether the appellate court could order judgment for a successful appellant who had failed to move for judgment notwithstanding the verdict under Rule 50(b). And in the first one, the *Cone* case, it is clear that certiorari was granted solely because of the importance of the question of federal procedure raised by the petition.[2]

The present case presents an equally important facet of the same general problem.

Rule 56[3] authorizes either or both parties to move for summary judgment on the basis of pleadings, affidavits, and depositions. Under subdivision (c) the motion must be served at least 10 days before the time fixed for the hearing, and the adverse party has until the day before the hearing to file affidavits countering the factual contentions on which the movant relies. Summary judgment is then rendered forthwith if, but only if, the papers on file "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

This Rule greatly expanded the scope of summary judgment proceedings in the federal courts. On the whole it has had a salutary effect in making possible the prompt disposal without trial of those cases in which there is no genuine issue of fact.[4] Undue expansion of the procedure,

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[2] "On three previous occasions we have granted certiorari to consider this point but failed to reach it because, upon examination of the evidence we found it sufficient to justify submission of all three cases to the jury. . . . In this case we granted certiorari 'limited to the questions of federal procedure raised by the petition for the writ.'". 330 U. S. 212, 215.

In the *Globe Liquor* case the primary reason for granting certiorari was, of course, the inconsistency between the decision of the Court of Appeals and the *Cone* case.

[3] The pertinent parts of the Rule are set forth in the Appendix to this petition.

[4] Such, of course, was its purpose. See Notes to the Rules of Civil Procedure, House Doc. No. 588, 75th Cong., 3d Sess. at 53 (1938).

however, carries with it grave dangers both for litigants and the courts. *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249 (1948), indicates one type of danger; the present case suggests another.

Petitioner's motion for summary judgment was based on a particular legal theory under which the only material facts concerned two written instruments. In the Court of Appeals' view, the case turned on a far different legal theory—one which had not previously been mentioned in the case and which involved facts entirely collateral to the written instruments. Respondents had not, by a motion filed at least ten days before the date of hearing, given any indication that they considered themselves entitled to summary judgment under *any* legal theory. Thus when the Court of Appeals included in its mandate directions to enter judgment for respondents, it held, by necessary implication, either (1) that petitioner, by invoking Rule 56, assumed the burden of showing the existence of a genuine issue as to facts material to a legal theory which respondents might have, but did not, advance in a cross-motion or (2) that the filing of her motion effected a waiver of her right to make such a showing.

The importance of summary judgment procedure [5] under

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[5] According to figures on file in the Administrative Office of the United States Courts for cases terminated in the fiscal year 1947, the latest year for which figures are available, motions for summary judgment were made in 353 cases. In 210 of these cases, as in the present case, the defendant alone made the motion; and in 123 of these 210, as in the present case, the motion was granted by the District Court.

These figures are based on individual case reports filed by the clerks of the various Districts Courts. The Administrative Office has informed petitioner that the reports probably fall well short of showing the full number of cases in which summary judgment was actually sought.

The Court has itself given recognition to the importance of having the summary judgment procedure clearly delineated. "The importance of questions raised under the summary judgment rule led us to grant certiorari." *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 621 (1944).

the Rules makes it desirable that the Court promptly and unmistakably inform bench and bar whether a litigant may resort to Rule 56 only if willing to gamble against losing all chance of trial should the appropriate Court of Appeals decide that his legal theory is not controlling.

2. *The action of the Court of Appeals in directing entry of judgment for respondents is inconsistent with the Federal Rules of Civil Procedure and with decisions in which this Court has construed them.*

(a) *The Court of Appeals had no power to direct entry of judgment for respondents.*

So far as petitioner has been able to ascertain there is no precedent from the other circuits to sustain the Court of Appeals' action. Nor has she found a case in which any other Court of Appeals has even considered the propriety of such action. Apparently it has been taken for granted, except by the court below, that entry of judgment should not be directed unless the successful appellant has previously made the appropriate motion under Rule 56.

While the question petitioner raises has never been decided by this court, the parallel to the *Globe Liquor* and *Cone* cases, *supra*, is so close as clearly to indicate error by the court below. In both those cases it was unanimously held that the appellate court had exceeded its power when it directed judgment for an appellant who had not moved for judgment n.o.v. within 10 days after return of an adverse verdict as required by Rule 50(b). One basis for the decisions was that the Rule allowed only 10 days, a time limit which the Court would not permit to be indirectly nullified. The underlying rationale, however, was that the Rules should not be construed to give a Court of Appeals power to direct entry of judgment in situations presenting

a substantial possibility that such action would often work injustice on the other party.

In the present case, as in those cases, the respondents made no motion within the time permitted by the Rules. Under the circumstances involved in this case, moreover, an appellate court's action in directing judgment is much more likely to result in injustice than it was in either the *Cone* or the *Globe Liquor* situations. In those cases there had been full trials; and the right for which the petitioners sought protection was only the right to show the District Court that they could fill crucial gaps in their evidence if accorded a new trial. In the present case there has been no trial; and petitioner has not had the opprotunity even to show a genuine *dispute* over facts material to the controlling legal theory.

Subdivision (c) of Rule 56 in so many words appears to guarantee petitioner the opportunity to attempt such a showing by affidavits and depositions. She would undoubtedly have had that opportunity if respondents had filed a cross-motion on the acknowledged-indebtedness theory.[6] As the Second Circuit stated in *Walling* v. *Richmond Screw Anchor Co.*, 154 F. 2d 780, 784 (1946), in which both sides had moved for summary judgment:

> ". . . although a defendant may, on his own motion, assert that, accepting his legal theory, the facts are undisputed, he may be able *and should always be allowed to show* that, if plaintiff's legal theory be adopted, a genuine dispute as to a material fact exists."[7]

Under the decision below petitioner has lost that opportunity solely because of respondents' carelessness in not

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[6] A contrary doctrine would defeat the purpose of the Rule by discouraging summary judgment procedure. It might also raise Constitutional questions as to due process and the right to trial by jury.

[7] Italics added. See also *Begnaud* v. *White*, 170 F. 2d 323, 327 (CCA 6, 1948).

moving for summary judgment. Respondents, on the other hand, have profited by their own failure to follow the procedure contemplated by the Rules.

If the decision below is allowed to stand, its exact effect will be problematical. But the general nature of that effect is letter-clear. The element of risk and uncertainty introduced by the decision could tend only to deter cautious litigants from resorting to a motion under Rule 56. To the extent that this tendency would be translated into actuality, the decision would work against the very considerations which led this Court to approve the Rule.

(b) *Even if the Court of Appeals had power to direct judgment for respondents, exercise of that power was not appropriate in this case.*

Assuming, for purposes of argument, the existence of power to direct entry of judgment for respondents, exercise of that power should be confined to those cases in which the appellate court clearly has before it all evidence relevant to the basic question: Is there a real dispute over facts material to the controlling legal theory?

In this case there can be no doubt that the Court of Appeals did not have before it all the evidence bearing on facts basic to the acknowledged-indebtedness theory. The record did happen to contain some evidence tending to show an acknowledged indebtedness.[8] But one party to the transaction, petitioner herself, had not been heard by either affidavit or deposition. Nor had she been remiss in not submitting to the District Court her testimony to negate

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[8] Petitioner believes that the Court of Appeals misconstrued that evidence and read it without adequate regard to evidentiary discrepancies also appearing in the record. But she recognizes that the pressure of the Court's business makes it undesirable for her to stress this argument in detail.

an acknowledged indebtedness; it would have been irrelevant to the only questions before that court: Whether the written instruments were controlling and, if so, whether they established a resulting trust in favor of respondents. After the surprise decision of the Court of Appeals, moreover, petitioner hastened to assure the court that she would, if afforded an opportunity, testify, by affidavit or in person,[9] to a version of the transaction far different from that reflected in Judge Clark's opinion. She renews that assurance in this Court and states her bona fide belief that she can show, at the least, a genuine dispute over several key facts.[10]

Even where a District Court is ruling on a motion for summary judgment, it must resolve against the movant all doubts regarding the existence of a genuine issue as to a material fact. *Toebelman* v. *Missouri-Kansas Pipe Line Co.*, 130 F. 2d 1016, 1018 (CCA 3, 1942). On appeal from an order granting summary judgment the Court of Appeals must do likewise. *Weisser* v. *Mutsam Shoe Corp.*, 127 F. 2d 344, 346 (CCA 2, 1942).[11] The principle applies with much greater force in the present case, for here the Court Appeals was in effect ordering summary judgment for a party who had never moved for it, against a party who had had no opportunity to oppose it, and on a record which was incomplete on the crucial issue.

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[9] In either the District Court or the Court of Appeals.

[10] Among the facts which petitioner's testimony would tend to establish are clear understandings among the parties (a) that she and her husband were not to assume responsibility for payment for certain repairs effected under the respondent Paul Filson's direction and (b) that the respondents were to have no further interest in the property upon expiration of their three-year repurchase option. Both facts are highly material to the question of whether "circumstances" surrounding the transaction indicated an acknowledged indebtedness, as the Court of Appeals has held.

[11] See also *Ramsouer* v. *Midland Valley R.R.*, 135 F. 2d 101, 105-6 (CCA 8, 1943); *Wittlin* v. *Giacalone*, 154 F. 2d 20, 21-2 (App. D. C. 1946).

Conclusion

The issue petitioner raises is important, yet so simple and clear-cut that the Court could resolve it without extended argument or, indeed, any argument. Certiorari should be granted and the Court of Appeals ordered to remand the case for trial.

Respectfully submitted,

WILLIAM M. AIKEN;
CHARLES A. HORSKY,
Counsel for Petitioner.

APPENDIX

Rule 56. Summary Judgment.

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

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OCTOBER TERM, 1948.

No. 542

ANNA M. FOUNTAIN, *Petitioner,*

v.

PAUL FILSON AND ANNA F. FILSON.

PETITIONER'S REPLY BRIEF

WILLIAM M. AIKEN,
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PETITIONER'S REPLY BRIEF

Certiorari should be granted even if the arguments in the brief in opposition are correct.

Respondents' brief in opposition is addressed to only one of the two reasons petitioner advanced to support a grant of certiorari. The decision below was correct, they say, and therefore the writ should be denied.

They make no attempt to controvert petitioner's contention that the case nonetheless involves an important question of federal procedure which has not been, but should be, settled by this Court. Under the Court's Rule 38, that factor warrants a grant of certiorari regardless of whether or not the decision below was right.

The arguments in the brief in opposition are not correct.

In addition, however, respondents' arguments in defense of the decision below do not withstand analysis. In essence they are based on this syllogism: Civil Rule 54(c) authorized and indeed required the District Court to render summary judgment in favor of respondents; the court did not do so; *ergo* the Court of Appeals properly included in its mandate directions to enter such a judgment without further proceedings.[1]

That this reasoning is in some crucial respect fallacious becomes readily apparent when a similar syllogism is tested against the *Cone*[2] and *Globe Liquor*[3] cases. In those cases the argument would run this way: Rule 54(c) required the District Court to render judgment n.o.v. in favor of the respondents; the court did not do so; *ergo* the Court of Appeals properly directed entry of judgment for them. In each case, however, this Court unanimously held that the Court of Appeals had no power to issue such a direction.

More detailed examination of respondents' position shows that their major premise and their conclusion are both highly questionable.

(a) *The District Court could not have rendered summary judgment for respondents without further proceedings.*

As indicated in the petition for certiorari, every relevant part of Rule 56 opposes the argument that even a

[1] Respondents also rely on Rule 56(d). That Rule, however, merely provides for narrowing the triable factual issues where the whole case is not disposed of on a motion for summary judgment; it has no bearing on the questions raised by the petition for certiorari.

[2] *Cone* v. *West Virginia P. & P. Co.*, 330 U. S. 212 (1947).

[3] *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571 (1948).

district court may without further proceedings enter summary judgment in favor of a party who has not moved for it in accordance with that Rule.[4] In framing their major premise respondents apparently assume that Rule 54(c), "Demand for judgment", tacitly and indirectly works a modification of Rule 56—and presumably of many other Rules, including Rule 50(b).

This assumption is based on a misapprehension of the scope and function of Rule 54(c). That Rule deals only with the *content* of a judgment. It comes into play after a district court, pursuant to the procedure established by other Rules (including Rule 56), has determined that the facts and the applicable substantive law entitle one party to a particular kind of relief; after that determination has been made, and then only, the Rule directs the court to grant the appropriate relief even though it was not explicitly requested in the pleadings.[5] But Rule 54(c) has nothing to do with the procedure whereby the court is to make the preliminary determination of what the appropriate relief is. It has nothing to do with when, *i.e.*, at what stage of a case, judgment should be entered. And in particular it has

[4] Subdivisions (a) and (b) permit both parties to move for summary judgment and set the earliest times each may file his motion. Subdivision (c) prescribes the latest time—10 days before the date fixed for the hearing; expressly gives the one who is resisting summary judgment at least nine days in which to file opposing affidavits; and then authorizes entry of judgment forthwith if the state of the facts permits it and if "*the moving party* is entitled to a judgment as a matter of law" (italics added).

[5] The Advisory Committee had this to say of the second sentence of the Rule, which is the relevant part for present purposes:

> "... It makes clear that a judgment should give the relief to which a party is entitled, regardless of whether it is legal or equitable or both. This necessarily includes the deficiency judgment in foreclosure cases formerly provided for by Equity Rule 10 (Decree for Deficiency in Foreclosures, Etc.)."

nothing to do with whether judgment may be entered against a party who not only has had no trial but has not even had an opportunity to show a dispute over the material facts.[6]

(b) *Assuming that the District Court could have rendered summary judgment for respondents under certain circumstances, the Court of Appeals could not direct entry of such a judgment.*

It may be that it is within a district court's power to provide certain supplementary procedures which would pave the way for the entry of summary judgment in favor of a party who did not make a timely motion under Rule 56. The present case will serve as an illustration. Suppose the District Court had taken the same view of the case as the Court of Appeals did—*i.e.*, that facts over which there was no substantial dispute pointed to an acknowledged indebtedness due re-

[6] Respondents rely on a speculative statement appearing in 3 Moore's Federal Practice, p. 3183 (1938) and on three district court decisions, two of which relied in turn on Professor Moore's statement.

In the same statement Professor Moore recognized that the point was not open and shut. In support of his generalization he cited a provision of the New York Civil Procedure Act which expressly puts litigants on notice that summary judgment may be entered for a party who has made no cross-motion therefor. To us the existence of that rule in New York, together with the absence of a similar provision in the later federal Rule, tends to indicate an intent not to adopt this particular of the New York practice. It may be relevant to note also that Professor Moore's statement was made before the *Cone* and *Globe Liquor* decisions and that he had not anticipated enunciation of the proposition for which they stand. See 3 Moore's Federal Practice pp. 130-2 (Supp. 1948).

The cases listed by respondents do not seem to us to reflect the best practice, but in any event are readily distinguishable in that the party against whom judgment was rendered had in each case tacitly agreed that there were no material facts in dispute; in none of the cases did the losing party object to the entry of judgment on the ground that his adversary had not filed a cross-motion.

spondents from petitioner. To make sure that petitioner's rights were not infringed, the court could easily have suspended proceedings long enough to allow respondents to perfect a motion for summary judgment and petitioner to attempt a showing that there was a genuine dispute over facts material to the new legal theory.[7] With a delay of but a couple weeks the court could then have made the determination contemplated by Rule 56(c) or (d), confident that both sides had been accorded their full day in court. Short of thus suspending the proceedings, the court could at least have asked petitioner if she considered any material facts to be in dispute and if so what they were and what kind of evidence she had to show the dispute.[8] If her position seemed sound, the court then could have withheld its decision until the evidence was proffered and examined.

Assuming for purposes of argument that one or the other of these procedures would be permissible under Rule 56, it does not follow that a Court of Appeals has power to direct entry of summary judgment in a case in which the district court has used neither alternative. In the present case, of course, the appellate court apparently made no effort to determine for itself the relevance or substantiality of the evidence petitioner of-

[7] For a recent case in which this procedure was followed, see *Pinkus* v. *Reilly*, 71 F. Supp. 993 (D. N. J. 1947).

[8] In the three cases upon which respondents rely, the district courts apparently considered that this minimum procedure was necessary but would suffice. In each case, as respondents' quotations show, the district court took pains to consider *sua sponte* whether the non-movant asserted any real dispute over material facts, and there is no indication that the losing parties requested the opportunity to present further affidavits. As indicated in note 6, *supra*, petitioner doubts if such procedure adequately complies with Rule 56, but she is willing to assume arguendo that it does.

fered to produce. Thus it did not accord petitioner even the minimum safeguards which a district court would have been required to provide. But, and probably more important, proceedings of the type now being considered are peculiarly adapted to trial court use. Wise judicial administration calls for interpretation of Rule 56, like Rule 50(b), to preclude their application at the appellate level.

Still another consideration, present in this case but not in the *Cone* and *Globe Liquor* cases, suggests a construction of the Rules which would not permit the result arrived at below. In those cases the appellate court knew that a remand without directions would necessarily have resulted in the considerable delay, expense and inconvenience consequent upon a complete new trial; in this case a simple remand would have produced no such effect if respondents were indeed entitled to summary judgment. On remand respondents presumably could have moved the District Court for summary judgment 10 days before the new hearing. If petitioner had not then succeeded in showing a dispute over material facts, respondents would have received their judgment without further delay. If, on the other hand, she had succeeded in showing such a dispute, trial would have been held and a miscarriage of justice averted.

Conclusion

Certiorari should be granted and the Court of Appeals ordered to remand the case for further proceedings.

Respectfully submitted,

WILLIAM M. AIKEN,
CHARLES A. HORSKY,
Counsel for Petitioner.

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OCTOBER TERM, 1948.

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v.

PAUL FILSON AND ANNA F. FILSON, *Respondents*.

OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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OPINION BELOW.

The only opinion is that of the Court of Appeals (R. 62), as yet not reported.

JURISDICTION.

The Court of Appeals entered its judgment on October 18, 1948 (R. 67), and on December 16, 1948, denied a timely motion of petitioner for its modification. Jurisdiction herein is invoked under 28 U. S. C. A., Section 1254(1) and 2101(c).

FEDERAL RULES.

Rule 54(d), as effective in compliment to Rule 56(a)(b)(c) but not set out nor referred to in the petition, or its appendix, is as follows:

> "* * * * Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

Rule 56(d) also entirely applicable, but not set out or referred to in the petition or its appendix, is as follows:

> "(d) Case not Fully Adjudicated on Motion. If on motion under this rule judgment (for summary judgment) is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly." (Our parenthetical insertion for clarity.)

THE QUESTION PRESENTED.

The propriety of application of Rules 54(d) and 56(d), instead of partial reliance by petitioner on Rule 56(a)(b)(c) as justifying the entry in the District Court sitting in equity of final judgment in favor of a party where only the adverse party has moved for summary judgment.

THE OPPOSITION.

Respondents respectfully propound the appellate direction of the primary duty of the District Court entirely conforms to and is required by Federal Rules 54 and 56.

STATEMENT.

The case presents that the Filsons invested $15,000 in a property in New Jersey being $7,000 cash as purchase money, and $8,000 spent in improvements, with the bills shown to and admitted by the Fountains, the prospective purchasers, who admit no gift to them was intended by or in reference to the subsequent transfer of title. The Filsons recouped $9,000 by mortgages on the property, leaving $6,000 as their invested equity. Upon conveyance by the Filsons, to the use of Fountains as joint tenants in the entireties in consideration of Fountain assumption of the $9,000 of mortgages, the Foutains jointly granted the Filsons a first option within three years to repurchase for $9,000 unless the Fountains paid them $6,000 in discharge of the option, thus making a total of $15,000 as the Fountain obligation payable to perfect their title. When the option expired as unexercised and the $6,000 was not paid, a joint obligation of the Fountains to pay $6,000 to the Filsons remained in full effect.

Upon denial by the Fountains of the obligation and for recovery thereof, the Filsons sued the Fountains in equity in the District of Columbia, where they were residing, to claim recovery of $6,000 and its security by placement of a resulting trust therefor on the property, and for general relief. After depositions in discovery as upon cross examination were taken by each party, Brainard Fountain died, and his wife, the present petitioner, was appointed his administratrix.

The action came before the District Court upon a Filson motion for the substitution of party and upon a Fountain motion for summary judgment on the ground that no re-

sulting trust arose from the deed and option under the New Jersey law.

The District Court denied the substitution, granted the summary judgment, and summarily dismissed the complaint in disregard of the claim for money and general relief.

The appellate court, agreeing no resulting trust arose, but disagreeing about the substitution of party and right to a money judgment as general relief, held the District Court in its equitable jurisdiction of the parties and subject matter, should have retained the case to do full justice. Finding the Fountain title and indebtedness were admittedly joint, in reversal, it adjudged and directed the District Court to enter judgment for $6,000 against the petitioner, Fountain, individually and as administratrix of her late husband. Her subsequent motion for modification of the Appellate Court judgment into a remand for further proceedings was denied. Thereupon, the mandate was stayed to permit application for writ of certiorari.

ARGUMENT.

Petitioner, by adjectival argument, rested upon *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571, and *Cone* v. *West Virginia P. & P. Co.*, 330 U. S. 212, would enlist the discretion of this Court, notwithstanding those decisions only conform to the rule previously established in *Aetna Ins. Co.* v. *Kennedy*, 301 U. S. 389, 81 L. Ed. 1176, as adherence to the basic principle that substantive right prevails over procedure, more definitely stated in *United States* v. *Sherwood*, 312 U. S. 584, 590, 85 L. Ed. 1058, 1063, as follows:

> An authority conferred on a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction, and the Act of June 19, 1934, authorizing this Court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive rights of litigants, or to enlarge or diminish the jurisdiction of federal courts.

The paramount substantive right in equity is stated in *Cange* v. *Boyd*, 229 U. S. 530, 552, 57 L. Ed. 1317, 1327, as follows:

> A court of equity ought to do justice completely and not by halves (citations omitted).
>
> One of the duties of such a court is to prevent a multiplicity of suits, and to this end a court of equity, if obliged to take cognizance of a case for any purpose, will ordinarily retain it for all purposes, even though this requires it to determine purely legal rights that otherwise would not be within the range of its authorities (citations here omitted).

Petitioner relying (pp. 7-8) on *Walling* v. *Richmond Screw Anchor Co.*, 154 F. (2) 780, 784, that each party having moved for summary judgment, either, as against the adoption of the opposing legal theory, may urge the existence of a genuine material fact, proceeds to complain as follows:

> Under the decision below petitioner has lost that opportunity solely because of respondent's carelessness in not moving for summary judgment. Respondents, on the other hand, have profited by their own failure to follow the procedure contemplated by the Rules.

This eagerness of argument or complaint is in disregard of the Rules and their necessary and actual application. It overlooks that Rule 56(d) provides as a necessary incident, where a summary judgment is rendered, for the further precise examination by the Court of the case to the end of effecting a pretrial summary confining further proceedings upon the actual and material facts in controversy and "directing such further proceedings as are just."

Thereof in 3 Moores Federal Practice 56.01, p. 3175, it is stated:

> "The Court is authorized to examine evidence, not for the purpose of trying an issue, but to determine whether there is a genuine issue of fact proper for

trial. If there is no genuine issue of fact in controversy, the parties are not entitled to a trial and the court, applying the law to the undisputed material facts may render a summary judgment. If there is a genuine issue as to a material fact, the case will go to trial. In this latter situation, however, Rule 56(d) imposes a duty upon the court to sift the issues and to specify which material facts are really in issue and which are not, thereby facilitating and expediting the trial. This pre-trial sifting of the issues upon a motion for summary judgment, as provided in Rule 56(d), is quite similar to the pre-trial procedure provided in Rule 16, except that under Rule 56(d) it is compulsory, while under Rule 16 it is discretionary with the court."

All argument of petitioner is met by the precise provisions of Rules 56(d) and 54(c), the former imposing the duty of inquiry and the latter the forthwith duty of immediate disposal by final judgment. Commentary upon the Rules has approved the application of both as necessary, and judicial decisions have approved the commentary and applied Rules 54(c) and 56(d). They show there is no novel question involved in their provisions or application.

In 3 Moores Federal Practice, Rule 56.03, p. 3183, we read the text and note as follows:

"'If either the proponent of a claim or the defending party moves for a summary judgment, and the court finds that the moving party is not entitled thereto, but that the other party is so entitled, it would seem that the court has the power to enter the proper judgment, although a cross-motion therefor was not made.' As the rule does not expressly cover this point a cross-motion for summary judgment would be advisable. * * *

. . . . . .

[8] "'Rule 54(c) gives the court the power to enter the final judgment to which the prevailing party is entitled, even if the party has not demanded such relief in his pleadings, except in default judgment cases. The theory is that the form of the pleadings should not place a limitation upon the power of the court to do justice. So where one party has invoked the power of the court to render a summary judgment against his ad-

versary, it is reasonable that this invocation gives the court power to render a summary judgment for his adversary if it is clear that the case warrants that result. (E. D. N. Y. C. P. R. (1937) 113: "If upon such motion made on behalf of a defendant it shall appear that the plaintiff is entitled to judgment, the judge hearing the motion may award judgment to the plaintiff, even though the plaintiff has not made a cross-motion thereto.")

Judicial decisions, applying the rules and the text commentary and note, are as follows:

United States v. *Erie County*, 8 F. R. D. 493, (U. S. D. C. W. D. N. Y.) (1940):

> "The Court had jurisdiction to dismiss the complaint. Upon the motion for summary judgment affidavits were submitted by each party and findings of fact and conclusions of law submitted by each party. No objection was raised to the entry of the judgment on the decision. The motion assumed the nature of a trial. Rule 56(d) contemplates that all issues may be decided on the motion, and Rule 54(c) provides that the court shall grant a judgment to which a party is entitled though not demanded in the complaint. Defendants did not move for summary judgment. The answers did demand judgment of dismissal. No issue is left to be determined. It would be an idle thing to have a new trial."

Northland Greyhound Lines v. *Amalgamated Association* (U. S. D. C. Minn.) (1946) 66 Fed. Supp. 431, 483, where only the plaintiff *Greyhound Lines* had moved for summary judgment, and where the above quoted text is approved:

> "The pleadings and affidavits are quite complete. They disclose the contractual relations between the parties for several years past including the facts leading up to the execution of the contract in suit. Although the parties draw different conclusions from certain facts, there is no controversion of any material fact and therefore no genuine issue for trial. Sum-

mary judgment is proper in such a case. Although Rule 56(c) provides in part 'the judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law', and defendants here have filed no cross-motion, it seems to me that where the case is properly disposable by summary judgment the court should enter whatever judgment is proper in the circumstances. This should be particularly true where the relief asked is a declaration of the rights of the parties to a contract under the Declaratory Judgment statute. While it may be the better practice to file a cross-motion I do not think that Rule 56(c) proscribes the court's power to enter judgment because of the mechanical failure of one of the parties to file a motion. This view finds support in 3 Moore's Federal Practice, Sec. 56.02 page 3183:

"'If either the proponent of a claim or the defending party moves for a summary judgment, and the court finds that the moving party is not entitled thereto, but that the other party is so entitled, it would seem that the court has the power to enter the proper judgment, although a cross-motion therefor was not made.'"

Hooker v. *New York Life Ins. Co.* (U. S. D. C. Texas) (1946) 66 Fed. Supp. 312, 318, where only the defendant moved for summary judgment and thereupon summary judgment was granted to plaintiff, and the note above quoted is expressly approved:

"There remains the question of the proper disposition of the case, since the plaintiff has not made a cross-motion for summary judgment. If the plaintiff had made such a motion, and if the defendant had admitted the facts which it so strongly urges, by way of affidavits, in favor of its motion, it would be clear that the plaintiff would be entitled to summary judgment. Since the purpose of the summary judgment procedure under Rule 56 is to expedite the disposition of actions

in which there is no genuine issue of fact requiring trial, it would seem that the court can properly enter a summary judgment in favor of the party entitled to it. 3 Moore, Federal Practice, Section 56.02.

"'Rule 54(c) gives the court the power to enter the final judgment to which the prevailing party is entitled, even if the party has not demanded such relief in his pleadings, except in default judgment cases. The theory is that the form of the pleadings should not place a limitation upon the power of the court to do justice. So where one party has invoked the power of the court to render a summary judgment against his adversary, it is reasonable that this invocation gives the court power to render a summary judgment for his adversary if it is clear that the case warrants that result.' Ibid., note 8.

"(11) The plaintiff is therefore granted summary judgment for $10,000, the amount of the double indemnity benefit."

It is here worthy of special note that Rules 54(c) and 56(d) were not amended in the recent revision of the Federal Rules.

The petition also contends petitioner should be heard on her tender after the appellate decision and now that her "testimony would tend to establish clear understandings among the parties (a) that she and her husband were not to assume responsibility for certain repairs effected under the respondent direction, and (b) that the respondents were to have no further interest in the property upon expiration of their three year repurchase option". (Quoted from Petition note (p. 9).)

These contentions were evidently available when the complaint was answered and not presented in the answer. Jointly with her husband petitioner took the title by assumption of $9,000 of mortgages, and by the option engaged to pay $6,000 to discharge their granted option, thus liquidating their liabilities as $15,000 and equalling the Filson investment. In the Walling decision, it appears the appellate court examined the case in the aspect of material

genuine issue of fact available to either party and found none, and likewise such examination herein preliminary to denial of the motion for modification was so made by the appellate court. There being no such available material fact in controversy, the previous direction of judgment for respondents was thereby confirmed.

CONCLUSION.

The power exercised and complained is but the full application of the pertinent Federal Rules, and the petition based on only part of the Rules is therefore without material merit and should be denied.

Respectfully submitted,

CAMDEN R. MCATEE,
Attorney for Respondents.

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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 542.

ANNA M. FOUNTAIN, *Petitioner*,

v.

PAUL FILSON and ANNA F. FILSON.

Petition for Writ of Certiorari Summarily Granted April 18, 1949, By Per Curiam, to the United States Court of Appeals for the District of Columbia.

RESPONDENT MOTION AND PETITION FOR REHEARING.

CAMDEN R. MCATEE,
Attorney for Respondent.

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RESPONDENT MOTION AND PETITION FOR REHEARING.

Respondents, Paul Filson and Anna F. Filson, by their attorney, respectfully move and petition the Court:

For rehearing in reconsideration of the summary *per curiam* grant of the petition for certiorari, and for consequent denial of the petition.

STATEMENT.

In support hereof, for respondents, the material matters are respectfully stated:

Below the trial court granted the motion of petitioner as defendant for summary judgment together with entry of final judgment for defendant against plaintiffs and for recovery of costs. Upon the appeal, the appellate court approved the grant of summary judgment, and stating the equitable duty of the trial court, also forthwith to decide the entire case upon the relief available to plaintiffs, ordered entry by the trial court of summary judgment for $6,000 against defendant, individually, and as the personal representative of her deceased husband, before his death a defendant party.[1] After the appellate court denied a defendant motion for modication of the order for personal judgment, the defendant petitioned for the grant of certiorari by this Court.

The Record filed by petitioner in support of the petition for certiorari, does not include the motion for modification of the appellate order filed by defendant in the appellate court. The record only includes the appellate order denying a motion for modification of the order. There is nothing to establish that any new issue came before or was passed upon by the appellate court.[2]

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[1] This statement omits that the trial court denied, but the appellate court granted substitution, as a party in his place, of Mrs. Fountain, the administratrix of her late husband. Consequently, the appellate court adjudged recovery of $6,000 against Mrs. Fountain as administratrix, and also personally against her. Her petition for certiorari is entirely against her personal liability under the appellate judgment orders.

[2] The Petition and Opposition do not show agreement that a new issue is involved, or that one is presented:

(A) The petition states:

(p. 3) Petitioner promptly moved for modification of the judgment on the ground that the Court of Appeals could not and should not do more than remand the case for further

By construction of the application of Rule 56, this Court granted the certiorari on the specific ground that "*here the order was made on appeal on a new issue, as to which the opposite party had no opportunity to present a defense before the trial court*".

GROUNDS FOR REHEARING.

As objections to the present grant of the petition for certiorari, and as cause for denial of the petition, for petitioners, it is respectfully represented:

(a) The predicate of the *per curiam* that the appellate court erroneously decided a new issue, on which the defendant should be heard, is not shown by the record, and has no existence.

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proceedings, but the motion was denied without opinion (R. 68).

* * * * * *

(p. 8) In this case, there can be no doubt that the Court of Appeals did not have all of the evidence bearing on the facts basic to the acknowledged indebtedness theory.

(p. 9) After the surprise decision of the Court of Appeals, moreover petitioner hastened to assure the Court that she would, if afforded an opportunity, testify, by affidavit or in person,[9] to a version of the transaction far different from that reflected in Judge Clark's opinion. She renews that assurance in this Court and states her bona fide belief that she can show, at the least, a genuine dispute over several key facts.[10]

[9] In either the District Court or the Court of Appeals.

[10] Among the facts which petitioner's testimony would tend to establish are clear understandings among the parties (a) that she and her husband were not to assume responsibility for payment for certain repairs effected under the respondent Paul Filson's direction, and (b) that the respondents were to have no further interest in the property upon expiration of their three-year repurchase option.

(B) The Opposition likewise is rested upon the barren motion for remand by its single statement:

(p. 4) Her subsequent motion for modification of the appellate court judgment into a remand for further proceedings was denied.

(b) The principles of the *Cone* and *Globe Liquor* precedents are not applicable in the present case.

RULES INVOLVED.

United States Supreme Court:

Rule 10.3: "No case will be heard until a record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing, shall be filed."

Federal Rules of Civil Procedure:

Rule 54(c) *Demand for Judgment.* "* * * Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

Rule 56(d) *Case not fully adjudicated on motion.* "If on motion under this rule judgment (for summary judgment) is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly."

ARGUMENT.

The argument is that a new issue is not presented, and, herefore, is not available as the basis of decision of the etition for certiorari, and, if assumed available, that the ssue is not one subject to trial under existing rules and recedents.

The new issue is not disclosed by the record which entirely omits the motion for modification of the appellate rulings that must have stated the matters of facts underlying the new issue.

The petition for certiorari and the opposition do not disclose a new issue.[3]

Not being established in the record, in the petition or in the opposition, the alleged new issue has no existence, and no place in the *per curiam* statement as the turning point of the case.[4]

Assuming the propriety of a trial of the alleged new issue is involved, the right to trial is best measured by the appellate consideration of the situation as being that where the trial court heard the entire case.[5] In this situation, the appellate court holds the trial court would have granted the defendant motion for summary judgment that plaintiffs were not entitled to the preference of a resulting trust, and also would have entered a personal money judgment against the defendant, individually, and as administratrix of her deceased husband, in favor of plaintiffs, as their entitled general relief.

Such proceedings, it is submitted, would be admittedly proper in the trial court. Rule 56(c) prescribes that, in ruling on a motion for summary judgment, the trial court shall also, by examination of the pleadings and evidence on file and interrogation of counsel, ascertain and state the facts not in material controversy, and so confine any subsequent trial to the remaining facts in material controversy.

[3] See Note 2 *supra* for their presentation.

[4] Revised Rules of this Court:

> 10(3). No case will be heard until a record, containing in itself, and not by reference, all the papers, exhibits, depositions and other proceedings which are necessary to the hearing, shall be filed.

[5] The Petition adopts this viewpoint by saying:

> (p. 3—Note 1) The case was treated, in short, as though it had been fully tried in the District Court.

as the right to trial depends on the existence of material controversy.[8] Rule 54 also makes it the duty of the trial court to enter a final judgment for the entitled party if no material facts appear substantially in controversy.

As further proceedings in the trial court, it will appear defendant, individually, moved for modification of the judgment for plaintiff, for cause that she should be heard testifying that the parties had understandings, first, that she and her husband were not to be responsible for all of the Filson repairs, and, second, that the Filson claim of interest in the property expired with the unexercised option.

Respondents submit her motion, in the aspects of modification of the personal judgment, or of a new trial, would be denied on the following grounds.

The motion predicates the judgment orders are proper, under Rules 54 and 56, unless defendant shows material cause against their finality. The motion cannot attack the judgment against defendant as the personal representative of her late husband, as it is directed entirely against, and limited to, her personal liability, and therefore only her liability for the repairs would be presented. The pleadings dispose of both claims made on the motion as they raise no issue as to any liability for repairs, and they expressly admit the defendants did not deny the plaintiffs' claim to interest in the property until September, 1945, nearly five years after expiration of the option. Her execution of the option shows the defendant admitted $15,000 to be the property value during the next three years by agreeing to pay

[8] *Carpenter* v. *Winn*, 221 U. S. 533, 538-9; 31 S. Ct. 683; 55 L. Ed. 842, 844:

"Blackstone defines 'trial' to be the examination of the matters of fact in issue. 3 Bl. Com. 330. This definition is adopted by Bouvier. In Miller v. Tobin, 9 Sawy. 401, 411, 18 F. 609, 616, Judge Deady applied this meaning to the removal act, saying:

"'Trial' is a common law term, and is commonly used to denote that step in an action by which issues or questions of fact are decided."

$6,000 in addition to the mortgage assumption of $9,000 in order to release the option and quiet the Filson interest. Non-exercise of the option discharged the Filson right to repossess the property, but not the Filson interest in the property.[7] The matters of fact relied on in the motion were always known to defendant, and not made grounds for defense, and, therefore, are not available as grounds for a new trial.[8]

Respondents submit defendant has presented no new issue available or material in opposition to the personal judgment against her.

In the foregoing or otherwise, the principles of *Cone*[9] and *Globe Liquor*[10] have no application. They are in construction of Rule 50 as to jury trial procedure as inclusive of certain discretionary rights to be exercised only by the trial court. Here was no jury trial, and instead, is a case subject only to Rules 54 and 56. Extension of this case, under the *Cone* and *Globe Liquor* principle, means the nec-

[7] *Western Union Tel. Co.* v. *Brown*, 253 U. S. 101, 110; 40 S. Ct. 460, 64 L.Ed. 803:

> "An option is a privilege given by the owner of property to another to buy the property at his election. It secures the privilege to buy, and is not, of itself, a purchase. The owner does not sell his property; he gives another the right to buy at his election."

[8] *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 425, 43 S. Ct. 58, 67 L.Ed. 719, 730:

> "We are prevented from knowing it by a most salutary rule of law, which after parties have had a full and fair opportunity to prepare their case, refuses to permit them to drag out litigation by bringing in new evidence which, with due diligence, they ought to have discovered before the hearing. The apparent hardship of particular cases should not and cannot weigh against the application of this sound principle. As Mr. Justice Story remarked in Ocean Ins. Co. v. Fields, 2 Story, 59, Fed. Cas. No. 10,406: 'It is for the public interest and policy to make an end to litigation; or, as was pointedly said by a great jurist, that suits may not be immortal while men are mortal.'"

[9] *Cone* v. *West Virginia P. & P. Co.*, 330 U. S. 212; 91 L.Ed. 849.

[10] *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571; 92 L.Ed. 177.

essary return in the future, of cases to the trial court for further proceedings instead of their summary disposal in the appellate court.

The *per curiam* holds, in its conclusion that the trial court should have considered the plaintiff claim for personal judgment, that the appellate court erred in depriving Mrs. Fountain of an opportunity to dispute facts material to that claim by ordering summary judgment against her. The appellate court, not informed of the disputed facts, certainly denied no opportunity to Mrs. Fountain. This case does not show the appellate court was so informed.[11]

For respondents, it is submitted the *per curiam* grant rests upon premises not established in the case presented, and that instead, the petition should be denied.

Respectfully submitted,

CAMDEN R. MCATEE,
Attorney for Respondents.

CERTIFICATE.

The undersigned certifies the foregoing motion and petition is presented in good faith, and not for delay.

CAMDEN R. MCATEE,
Attorney for Respondents.

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[11] Petitioner designation of the record, underlying the petition for certiorari, only includes the appellate order in denial of the Fountain motion for modification of its judgment order, and for remand of the case for further proceedings. Omission from the designation, and from the record, of the Fountain motion, on which the order of denial was made, puts aside any consideration, by the parties or by this Court, of appellate discretion exercisable in ruling upon the motion. Under Rule 10-3 it cannot be assumed the appellate court ever was advised of or disregarded any contentions of Mrs. Filson which required its discretionary consideration in ruling upon her motion. Petitioner has elected not to disclose for consideration in this Court whatever the Fountain motion may have disclosed to the appellate court.